IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR.; all residing at 4801 Queens Chapel Terrace N.E. D.C.; SAMUEL D. GRAHAM, individually and on behalf of BARBARA JEANE GRAHAM and KAREN CHANDELLE GRAHAM; all residing at 1827 Massachusetts Ave. S.E. D.C.; MARY ALICE BROWN, individually and on behalf of CHARLES HUDSON BROWN; both residing at 2412 20th St. D.C. ; PAULINE SMITH, individually and on behalf of MAURICE HOOD; both residing at 1017 4th St. S.E. D.C.; WILLIE DAVIS, JR., individually and on behalf of RONALD D. DAVIS, REGINALD D. DAVIS and MYOSHI J. DAVIS; all residing at 3931 14th St. N.W., D.C.; JAMES K. WARD, individually and on behalf of CHRYCYNTHIA ELAIN WARD; both residing at 1100 Trenton Pl. S.E. D.C.; JOYCE M. MAKEL, individually and on behalf of MICHELLE I. MAKEL; and CAROLYN HILL STEWART, residing at 1303 Congress St. S.E. D.C.

CIVIL ACTION
No. 82-66

Plaintiffs,

- against-

CARL F. HANSEN, Superintendent of Schools of the District of Columbia; THE BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA; WESLEY S. WILLIAMS, President of the Board of Education of the District of Columbia; CARL SMUCK, EVERETT A. HEWLETT, WEST A. HAMILTON, LOUISE S. STEELE, EUPHEMIA L. HAYNES, GLORIA K. ROBERTS, PRESTON A. McLENDON, and IRVING B. YOCHELSON, members of the Board of Education of the District of Columbia; CHIEF JUDGE MATTHEW F. McGUIRE; SENIOR JUDGES JOSEPH L. JACKSON, HENRY A. SCHWEINHAUT, CHARLES S. McLAUGHLIN and DAVID A. PINE; and DISTRICT JUDGES ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, BURNITA SHELTON MATTHEWS, LUTHER W. YOUNGDAHL, JOSEPH C. McGARRAGHY, JOHN J. SIRICA, GEORGE L. HART, JR., LEONARD P. WALSH, WILLIAM B. JONES, SPOTTSWOOD W. ROBINSON, III, HOWARD S. CORCORAN, OLIVER GASCH, WILLIAM B. BRYANT, all of the United States District Court for the District of Columbia; THE BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA; CHARLES H. MAYER, (Chairman), ERNEST SCHEIN and DR. ROBERT EARL MARTIN, members of the Board of Elections of the District of Columbia,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

C O M P L A I N T

The plaintiffs, for their verified complaint, allege:

Parties

1. Plaintiffs:

(a) The infant plaintiffs, JULIUS W. HOBSON, JR., (McKinley High School); BARBARA JEANE GRAHAM, (Eastern High School); KAREN CHANDELLE GRAHAM, (Hines Jr. High School); CHARLES HUDSON BROWN, (Langdon Elementary School); MAURICE HOOD, (Randall Jr. High School); RONALD D. DAVIS, (Crosby Noyes Elementary School); REGINALD D. DAVIS, (Crosby Noyes Elementary School); MYOSHI J. DAVIS, (Crosby Noyes Elementary School); CHRYCYNTHIA ELAIN WARD, (Congress Heights Elementary School), and MITCHELL I. MAKEL, (Crosby Noyes Elementary School) are among those generally classified as Negroes; are citizens of the United States and of the District of Columbia. They are within the statutory age limits of eligibility to attend the public schools of the District of Columbia. They satisfy all of the requirements for admission to such schools and are, in fact, attending public schools under the supervision, operation and control of the defendants. These plaintiffs comprise two general categories, viz., those who are eligible to attend and are attending public elementary schools and those who are eligible to attend and are attending public secondary schools in the District of Columbia, both types of schools being under the direct supervision, operation and control of the defendants. Some plaintiffs have been placed and are presently placed in the "basic" and "general" tracks of the so-called "track system" presently in operation in the public schools of the District of Columbia, as more fully explained in the paragraph of this complaint numbered and designated "13".

(b) Adult plaintiffs, JULIUS W. HOBSON, SAMUEL D. GRAHAM, MARY ALICE BROWN, PAULINE SMITH, WILLIE DAVIS, JR., JAMES K. WARD and JOYCE M. MAKEL are among those classified as Negroes; are citizens of

the United States and of the District of Columbia and are residents of and domiciled in the District of Columbia. They are taxpayers of the District of Columbia and of the United States. They are guardians and parents of the infant plaintiffs referred to in the paragraph above and designated in the caption of this action, and are required by the laws of the District of Columbia to send the children under their charge and control to public or private schools. In addition, plaintiff JULIUS W. HOBSON has been compelled, for some or all of the reasons hereinafter set forth, to remove his infant daughter, JEAN MARIE HOBSON, from the Amidon Elementary School, a public school under the supervision and control of the defendants, and enroll her, at great cost and inconvenience, in a private school.

(c) Plaintiff CAROLYN HILL STEWART is among those classified as Negroes; is a citizen of the United States and of the District of Columbia and is a resident of and domiciled in the District of Columbia. She is a permanent teacher in the public school system of the District of Columbia and is required by the terms of her employment to obey, adhere and conform to defendants' rules, regulations, policies, directives, customs, practices and usages.

2. Plaintiffs bring this action in their own behalf and in behalf of all other Negro children attending the public schools in the District of Columbia, their parents and guardians, and teachers employed by the defendants similarly situated and affected with reference to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being common questions of law and fact, a common relief being sought, as will hereinafter more fully appear, plaintiffs present this action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

3. <u>Defendants</u>:

(a) Defendant BOARD OF EDUCATION exists pursuant to the laws of the United States governing the District of Columbia. (Code of the District of Columbia, §31-101) Defendant WESLEY S. WILLIAMS,

the United States and of the District of Columbia and are residents of and domiciled in the District of Columbia. They are taxpayers of the District of Columbia and of the United States. They are citizens and voters of the United States and of the District of Columbia and are qualified by the laws of the District of Columbia to vote and the officers under their charge and control to public or private schools. In addition, plaintiff JULIUS W. WOODSON has been compelled, for some or all of the seasons hereinafter set forth, to remove his infant daughter, JANE MARIE WOODSON, from the Anacostia Elementary School, a public school under the supervision and control of the defendants, and which has, at great cost and inconvenience, to a private school.

(c) Plaintiff CAROLYN WILL STUART is among those citizens, filed as taxpayer, as a citizen of the United States and of the District of Columbia and is a resident of and domiciled in the District of Columbia. She is a permanent teacher in the public school system of the District of Columbia and is employed by the Board of Education to teach, advise and confer on delinquent girls, sophisticated, politicians, directions, customs, practices and manner.

2. Plaintiffs bring this action in their own behalf and in behalf of all other boys and girls attending the public schools in the District of Columbia, their parents and guardians, and teachers employed by the defendants similarly situated and affected with reference to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being common questions of law and fact, a common relief being sought, as will hereinafter more fully appear, plaintiffs present this action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

3. Defendants:

(a) Defendant BOARD OF EDUCATION exists pursuant to the laws of the United States governing the District of Columbia. Under the Statutes of Columbia, Article Defendant [illegible]

(Negro) is President of the said BOARD OF EDUCATION; defendants CARL SMUCK (white), EVERETT A. HEWLETT (Negro), WEST A. HAMILTON (Negro), LOUISE S. STEELE (white), EUPHEMIA L. HAYNES (Negro), GLORIA K. ROBERTS (white), PRESTON A. McLENDON (white), and IRVING B. YOCHELSON (white), are members of the said BOARD OF EDUCATION and all are being sued in their official capacities.

(b). Defendant, CARL F. HANSEN, is the Superintendent of Schools of the District of Columbia (hereinafter referred to as the Superintendent of Schools). He is the executive officer of the Board of Education, charged with the responsibility of maintaining, managing and governing the public schools in the aforesaid District, in accordance with the rules, regulations, policies, directives, customs, practices and usages established by defendant BOARD OF EDUCATION. He is being sued in his official capacity.

(c) The defendant, HON. MATTHEW F. McGUIRE, is the Chief Judge of the United States District Court for the District of Columbia; the defendants HONS. JOSEPH L. JACKSON, HENRY A. SCHWEINHAUT, CHARLES S. McLAUGHLIN and DAVID A. PINE, are Senior Judges of the United States District Court for the District of Columbia; defendants, the HONS. ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, BURNITA SHELTON MATTHEWS, LUTHER W. YOUNGDAHL, JOSEPH C. McGARRAGHY, JOHN J. SIRICA, GEORGE L. HART, JR., LEONARD P. WALSH, WILLIAM B. JONES, SPOTTSWOOD W. ROBINSON, III, HOWARD S. CORCORAN, OLIVER GASCH, and WILLIAM B. BRYANT are District Judges of the United States District Court for the District of Columbia. All are being sued in their official capacities.

(Any reference to defendants hereinafter contained in this complaint shall not pertain to any of the United States District Court judges heretofore mentioned unless they are specifically mentioned by name or designation.)

(d) Defendants, CHARLES H. MAYER, (Chairman), ERNEST SCHEIN and DR. ROBERT EARL MARTIN, are members of the Board of Elections of the District of Columbia and are sued in their official capacities. Said Board of Elections has the responsibility for scheduling, holding and/or conducting all elections within the District of Columbia. (Any reference

to defendants hereinafter contained in this complaint shall not pertain to any of the members of the Board of Elections of the District of Columbia heretofore mentioned unless they are specifically mentioned by name or designation.)

JURISDICTION

4. (a) The jurisdiction of this Court is invoked under Title 28 U.S.C., §1331. This action arises under the Fifth Amendment to the Constitution of the United States, and Article II, §2, Clause 2 of the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Ten Thousand ($10,000.00) Dollars.

(b) The jurisdiction of this Court is also invoked under Title 28 U.S.C. §1343. This action is authorized by Title 42 U.S.C., §§1981 et seq., §§ 2000(c) et seq., and §§2000(d) et seq.; and the Elementary and Secondary Education Act of 1965.

(c) The jurisdiction of this Court is further invoked under Title 28 U.S.C. §2282. This is an action for a permanent injunction restraining, inter alia, the enforcement, operation and execution of §31-101 of the District of Columbia Code and of the rules, regulations, policies, directives, customs, practices and usages of the Board of Education of the District of Columbia as more fully set forth below.

5. This is a proceeding for declaratory judgment under Title 28 U.S.C., §2201 for the purpose of determining questions of actual controversies between the parties, to wit:

(a) The question of whether §31-101 of the District of Columbia Code which directs the District Judges of the United States District Court forthe District of Columbia to appoint the members of the Board of Education of the District of Columbia (hereinafter referred to as the Board of Education) violates Article II, §2, Clause 2 of the Constitution of the United States in that it purports to and does in fact delegate unconstitutional powers to the District Judges of the United States District Court for the District of Columbia.

(b) The question of whether the rules, regulations, policies, directives, customs,practices and usages of the defendants and each of them, in denying,on account of race and color, the infant plaintiffs and other Negro children of public school age residing in the District of Columbia, educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated in the District of Columbia, are unconstitutional and void, as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

(c) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants, and each of them in denying on account of race and color the adult plaintiffs, with the exception of plaintiff CAROLYN HILL STEWART, and other parents and guardians of Negro children of public school age similarly situated residing in the District of Columbia, rights and privileges of sending their children to public schools in said District with educational opportunities, advantages and facilities, including those hereinafter specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age in the District of Columbia, are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

(d) The question of whether the enforced participation of plaintiff CAROLYN HILL STEWART and other Negro teachers employed by the Board of Education of the District of Columbia in the implementation of rules, regulations, policies, directives, customs, practices and usages of defendants and each of them, which deny, on account of race and color, to the infant plaintiffs and other Negro children residing in said District educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities,

advantages and facilities afforded and available to white children of public school age similarly situated, deprives said plaintiffs of due process and the equal protection of the law, in contravention of the Fifth Amendment to the Constitution of the United States.

(e) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them in intentionally denying, on account of race and color, the infant plaintiffs and other Negro children of public school age residing in the District of Columbia educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated in adjoining, adjacent and contiguous areas of Maryland and Virginia are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law, in contravention of the Fifth Amendment to the Constitution of the United States.

(f) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them in intentionally denying, on account of race and color, the adult plaintiffs, with the exception of CAROLYN HILL STEWART, and other parents and guardians of Negro children of public school age similarly situated residing in the District of Columbia, rights and privileges of sending their children to public schools in their District with educational opportunities, advantages and facilities, including those hereinafter specified, equal to the educational opportunities, advantages and facilities offered and available to white children of public school age in adjoining, adjacent and contiguous areas of Maryland and Virginia, are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

CAUSES OF ACTION

First Cause of Action:

6. Pursuant to §31-101 of the District of Columbia Code, the District Judges of the United States District Court for the District of Columbia are directed and empowered to nominate and appoint nine (9) members of the defendant BOARD OF EDUCATION, as follows: three members thereof to be nominated and appointed per annum for terms of three (3) years.

7. Said defendant BOARD OF EDUCATION consists exclusively of non-judicial officers with solely executive responsibilities wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia.

8. The vesting of the power of nomination and appointment of non-judicial officers with executive responsibilities wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia is prohibited by Article II,§2, Clause 2 of the Constitution of the United States.

9. Said defendant BOARD and the members thereof have, therefore, been unconstitutionally nominated and appointed and are now unconstitutionally functioning and operating as the Board of Education of the District of Columbia.

10. Defendant HANSEN having been nominated and appointed by defendant BOARD OF EDUCATION and the members thereof has been and is now unconstitutionally functioning and operating as the Superintendent of Schools.

Second Cause of Action:

11. The establishment, maintenance and administration of public schools in the District of Columbia are vested in the Board and the Superintendent of Education of the District of Columbia.

12. The public schools of the District of Columbia are under the direct control and supervision of defendants who are under a duty to maintain an efficient system of public schools in said District, wholly consistent with the requirements of the Constitution of the United

States. Said District has a public school population that is almost ninety percent Negro and ten percent white, and a total population that is sixty-one percent Negro and thirty-nine percent white.

13. The defendants, and each of them, have at all times operated and, unless restrained as a result of this action, will continue to operate the public school system of the District of Columbia in such a manner as to discriminate against the infant plaintiffs solely because of their race and/or color, all in violation of the Fifth Amendment to the Constitution of the United States. Among other things, defendants:

(a) have originated and continue to administer since the decision of the United States Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), in the public schools under their supervision, a rigid system of pupil ability grouping, referred to hereinafter as the "track system". This system consists of at least four (4) tracks -- basic, general, regular and honors -- and the placement of a public school student in any one thereof is normally decisive during the balance of his or her public school attendance. The intent and/or effect of the application of said "track system" has been the separation, segregation and exclusion of the infant plaintiffs and their classes, as well as the denial thereto of an education equal to that offered all qualified students who are not of Negro descent.

Moreover, the further intent and/or effect of defendants' application of the "track system" is to deprive the infant plaintiffs and their classes of further educational opportunity by the discriminatory utilization of the non-college preparatory "general" and "basic" tracks insofar as Negro pupils are concerned. At the same time, the college preparatory "regular" and "honor" tracks are discriminatorily utilized by the defendants to allow students who are not of Negro descent to qualify for college and to separate them from the bulk of students of Negro descent.

Moreover, the further intent and/or effect of the "track system" is to discourage and prevent the infant plaintiffs and their classes from even completing their secondary education.

(b) have pursued and continue to pursue educational policies and practices based upon race and color that foster and encourage the juvenile delinquency of the infant plaintiffs and their classes.

(c) have provided and continue to provide for those schools under their supervision with predominantly white pupil populations plant, equipment, materials, supplies and curricula discriminatorily superior to those provided for schools with predominantly Negro pupil populations, thereby depriving the infant plaintiffs and their classes, solely because of race and color, the opportunity of attending public schools where they can obtain an education equal to that offered to all qualified students who are not of Negro descent.

(d) have utilized and continue to utilize public revenues under their control to match or equal private funds raised in predominantly white residential areas of the District for the purpose of improving the plant, equipment, materials, supplies and curricula in the public schools of said areas, thereby discriminating against public schools attended by the infant plaintiffs and their classes.

(e) have accepted and continue to accept private funds for use in the improvement of plant, equipment, material, supplies and curricula in designated public schools with predominantly white pupil populations, thereby depriving the infant plaintiffs and their classes, solely because of race and color, the opportunity of attending public schools where they can obtain an education equal to that offered to all qualified students who are not of Negro descent.

(f) have stationed and continue to station police and other law enforcement officials conspicuously in and about schools attended by the infant plaintiffs and their classes, thereby causing the intimidation and degradation of said Negro students solely because of their race and color.

(g) have dismissed from and/or refused to appoint and continue to dismiss and/or refuse to appoint to high administrative and policy making positions in the District school system qualified Negroes solely on account of their race and color.

(h) have failed, neglected and refused and continue to fail, neglect and refuse to promote plaintiff CAROLYN HILL STEWART and other Negro teachers similarly situated to positions for which they are highly qualified, solely because of their race and color.

(i) have failed to utilize and continue to fail to utilize funds provided by the Elementary and Secondary Education Act of 1965 to further the education of those infant plaintiffs and their classes who are members of families earning Three Thousand ($3000.00) Dollars or less per annum, and have, instead, discriminated and continue to discriminate in the distribution of said funds in favor of those schools under their supervision with predominantly white pupil populations.

(j) have allocated and assigned and continue to allocate and assign less experienced and/or "temporary" teachers to those schools attended by the infant plaintiffs and their classes, while at the same time they have allocated and assigned and continue to allocate and assign more experienced and "permanent" teachers to those schools with predominantly white pupil populations.

(k) have drawn and continue to draw the geographical lines or limits of the various sections of the District of Columbia under their jurisdiction so as to separate, segregate and exclude the infant plaintiffs and their classes from those schools with heretofore predominantly white school populations so as to maintain the racial composition thereof.

(l) have ignored and violated and continue to ignore and violate the mandate of the Supreme Court of the United States in Bolling v. Sharpe, supra, in which the Court held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." (at 500)

Third Cause of Action:

14. Defendants have failed, refused and neglected and continue to fail, refuse and neglect to demand adequate funds from the agencies of the District of Columbia and the Congress of the United

States with which to operate the public school system under their control. Such refusal, neglect and failure, together with defendants' improper actions as hereinbefore alleged have directly resulted in the decline of the quality of the plant, equipment, materials, supplies and curricula of the public school system of the District of Columbia, thereby purposely and wilfully creating racial discrimination and segregation in the public schools of the District of Columbia in relation and diametric contrast to those in adjoining, adjacent and contiguous sections of Virginia and Maryland. As a result, the infant plaintiffs and their classes have suffered and are continuing to suffer from said failure, neglect and refusal of defendants to demand adequate funds for the operation of the District school system, and their other improper actions as hereinbefore alleged, all in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Fourth, Fifth and Sixth Causes of Action:

15. All of the allegations hereinbefore set forth based on race and/or color are hereby repeated and realleged based upon economic deprivation and poverty with the same force and effect as if more fully and completely here set forth.

16. Plaintiffs and others similarly situated are suffering irreparable injury and are threatened by irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this suit for declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated could be entitled would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience not only to the plaintiffs and those similarly situated, but to defendants, as well.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

1. The Court, upon filing of this complaint, notify the Chief Judge of this Circuit as required by 28 U.S.C., §2284, so that the Chief Judge may designate two other judges to serve as members of a three-judge court as required by Title 28, U.S.C., §2282, to hear and determine this action.

2. The Court enter a judgment or decree declaring that §31-101 of the District of Columbia Code is unconstitutional insofar as it purports to direct or does direct the nomination and appointment of the Members of the Board of Education of the District of Columbia by the District Judges of the United States District Court for the District of Columbia.

3. The Court issue a permanent injunction forever restraining the judicial defendants from executing, enforcing or administering so much of §31-101 of the District of Columbia Code as empowers them to nominate and appoint members of the defendant Board of Education.

4. The Court enter a judgment and decree declaring that the defendant members of the Board of Education and the defendant Superintendent of Schools purporting to hold office in the District of Columbia have been illegally nominated and appointed thereto and declaring vacant each of said offices and nominating and appointing interim trustees or receivers to administer the District school system until certification of the results of at-large elections as hereinafter set forth, and subject to such directives as this Court may issue.

5. The Court enter a judgment or decree ordering and directing the Board of Elections of the District of Columbia promptly to schedule, hold and conduct at-large elections for the nine vacant positions of members of the Board of Education with the duration and sequence of their said terms in conformity with the present duration and sequence thereof.

6. The Court issue a permanent injunction forever restraining and enjoining the defendants Board of Education and Superintendent of Schools and each of them from:

(a) any further utilization of the "track system" or any other ability grouping or other test or device that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(b) any further utilization of plant, equipment, materials, supplies and curricula that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(c) any delineation or demarcation of school zone lines that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(d) any further matching or equaling of public revenues under the control and supervision of defendants with private funds that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(e) any further acceptance of private funds that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(f) any further stationing of law enforcement officers in or about any school under the control and supervision of defendants that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(g) any further utilization of funds provided by the Elementary and Secondary School Act of 1965 that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(h) any further pursuance of educational policies and practices based upon race and color that foster or encourage juvenile delinquency among the infant and their classes.

(i) any further disproportionate assignment of teacher personnel that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(j) any further dismissal of or refusal to appoint qualified Negro citizens to high administrative and/or policy-making positions in the district school system that is intended to or does in fact discriminate on the basis of race and color;

(k) any further refusal, neglect or failure to promote qualified Negro teachers that is intended to or does in fact discriminate on the basis of race and color;

(l) any further refusal, neglect or failure to demand of the Commissioners of the District of Columbia and the Congress those funds necessary to provide the infant plaintiffs and their classes with the quantity and quality of education equal to that provided to white children in the public schools of adjoining, adjacent and contiguous areas of Maryland and Virginia.

7. Plaintiffs further pray that the Court will allow them their costs herein and such further, other or additional relief as may appear to the Court to be equitable and just.

8. Plaintiffs further pray that the Court retain jurisdiction of this cause after judgment, to render such relief as may become necessary in the future.

WILLIAM M. KUNSTLER
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Arthur Kinoy
William M. Kunstler

Attorneys for Plaintiffs

By William M. Kunstler
William M. Kunstler

Of Counsel:

William L. Higgs

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,388
(C.A. No. 1071-66)

JULIUS W. HOBSON, ET AL. Petitioners.

v.

UNITED STATES OF AMERICA, Respondent.

MOTION TO EXTEND TIME FOR FILING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS.

Respondent's brief in Opposition to the above petition is currently due on August 17, 1966. Because of the press of other matters previously assigned, particularly the appeal from two manslaughter and an assault with a deadly weapon convictions in the case of Rowe v. United States, No. 19,909 and the §2255 appeal from second degree murder, robbery and unauthorized use of a vehicle convictions in the case of Dykes v. United States, No. 20,242 (both appellants remaining in jail) the assistant assigned to this case has been unable to complete the brief.

WHEREFORE, it is respectfully requested that respondent's time to file its Opposition be extended to and including September 9, 1966.

/s/ DAVID G. BRESS
DAVID G. BRESS
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

THIS MOTION IS HEREBY GRANTED

Actg CHIEF JUDGE

DATED SEP 1 1966

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been mailed to petitioners, c/o of Julius W. Hobson, residing at 4801 Queens Chapel Terrace, N.E., Washington, D. C., on this 17th day of August 1966.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

Send this Back to me at
4801 Queens Chapel Ter. NE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Julius

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR., et al., Plaintiffs	
v.	CIVIL ACTION NO. 82-66
CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al., Defendants	

OPINION

William M. Kunstler, Washington, D. C., and Arthur Kinoy, New York, New York, for the plaintiffs.

Milton D. Korman, Acting Corporation Counsel for the District of Columbia, and John A. Earnest and William T. [illegible], Assistant Corporation Counsel for the District of Columbia, for all defendants except the Judges of the United States District Court for the District of Columbia.

David G. Bress, United States Attorney, and Joseph [illegible], Assistant United States Attorney, for the defendant Judges of the United States District Court for the District of Columbia.

WRIGHT, Circuit Judge:*

In these proceedings Negro parents, individually and on behalf of their minor children, charge racial discrimination by the Superintendent of Schools and the Board of Education of the District of Columbia in the administration of public schools in the District. Plaintiffs allege that these defendants are violating not only the due process and equal protection clauses of the Constitution, but are also failing to comply with the decision of the Supreme Court in Bolling v. Sharpe, 347 U.S. 497, 500 (1954), "that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." Plaintiffs allege that these racial discriminations by the defendant school superintendent and school board members not only deprive them of educational

* Sitting by designation pursuant to 28 U.S.C. § 291(c).

opportunities equal to those provided white students in the public schools in Washington, but also "foster and encourage the juvenile delinquency of the infant plaintiffs and their classes."

The racial discrimination is alleged to be effected through the use of a so-called "track system," by gerrymandering school districts, and by utilizing public revenues to improve public schools with predominantly white pupil populations. The complaint also alleges that Negro school teachers and Negro administrative personnel are discriminated against by the defendant school superintendent and board members in work assignments and promotions.

The complaint charges that school board members and the school superintendent are holding their offices illegally, being appointed by the judges of the United States District Court for the District of Columbia pursuant to Title 31, District of Columbia Code, Section 101, which statute is said to be unconstitutional in that it places executive power and duties in the judicial branch of the government. Plaintiffs ask that a three-judge district court be convened, as required by 28 U.S.C. § 2284, to hear and determine this action and to issue a permanent injunction restraining the judicial defendants from enforcing 31 D. C. Code § 101, and restraining the defendant board members and superintendent of schools from discriminating against Negro children and teachers in the administration of the public schools in the District of Columbia. The question as to the necessity for a three-judge court convened pursuant to 28 U.S.C. § 2284 to hear this case is before this court at this time by reason of plaintiffs' motion for summary judgment and defendants' motion to dismiss.

28 U.S.C. § 2282 provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." Since the complaint in this case alleges the unconstitutionality of an Act of Congress and prays for a permanent injunction

restraining its enforcement, a literal interpretation of 28 U.S.C. § 2282 would require the convening of a three-judge district court. In interpreting the need for such a court, however, the Supreme Court, in Bailey v. Patterson, 369 U.S. 31, 33 (1962), has held that such a court is not required "when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking non-existent," nor when "prior decisions make frivolous any claim" that the statute is constitutional. In short, if the claim of constitutionality or unconstitutionality is frivolous, a three-judge district court is not required.

The parties, at this stage of the proceedings, agree that the question as to the constitutionality of 31 D. C. Code § 101 is "wholly insubstantial" and frivolous and that a three-judge district court is not required. But plaintiffs in their motion for summary judgment argue that the statute is patently unconstitutional, while the defendants in their motion to dismiss argue precisely the reverse.

Plaintiffs predicate their claim of unconstitutionality of the statute on Article II, Section 2, Clause 2 of the Constitution of the United States which reads, in pertinent part: "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." They point to the language in Ex parte Hennen, 38 U.S. (13 Pet.) 230, 257-258 (1839), upholding under this clause of the Constitution the appointment of clerks of court by courts of law:

> "* * * The appointing power here designated, in the latter part of the section was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of Courts properly belongs to the Courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. * * *"

Plaintiffs also cite Ex parte Siebold, 100 U.S. (10 Otto) 371 (1879), and Rice v. Ames, 180 U.S. 371 (1901), as supporting their position that this clause limits court appointments to inferior officers whose duties are related to the judicial function. Plaintiffs also rely on O'Donoghue v. United

States, 289 U.S. 516 (1933), which, in holding that the courts in the District of Columbia were Article III as well as Article I courts, stated:

> "It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." 289 U.S. at 540.

The defendants also strongly rely on O'Donoghue v. United States, supra, and the line of cases which make clear that the judicial functions of the courts in the District of Columbia are not limited in the same way as Article III courts.[1] They point to the language in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 591-592 (1949):

> "It is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III, for it has been done with this Court's approval. O'Donoghue v. United States, 289 U.S. 516. In that case it was held that, although District of Columbia courts are Art. III courts, they can also exercise judicial power conferred by Congress pursuant to Art. I. The fact that District of Columbia courts, as local courts, can also be given administrative or legislative functions which other Art. III courts cannot exercise, does but emphasize the fact that, although the latter are limited to the exercise of judicial power, it may constitutionally be received from either Art. III or Art. I, and that congressional power over the District, flowing from Art. I, is plenary in every respect."

Since the District of Columbia courts are local courts, the defendants maintain, the limitations upon the types of functions which can be performed by federal courts sitting within states are inapplicable to them.[2]

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[1] Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927); Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923).

[2] See, e.g., Muskrat v. United States, 219 U.S. 346, 361 (1911); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). Compare Glidden Company v. Zdanok, 370 U.S. 530, 552 (1962) (opinion of Mr. Justice Harlan).

In attempting to show that the issue as to the constitutionality or unconstitutionality of the statute in suit is frivolous, none of the parties has been able to cite a case in which functions similar to the appointing of a school board have been assigned the courts in the District of Columbia by Congress. In all of the cases cited, the duties imposed on the District of Columbia courts have been at least arguably judicial in the broad sense, although not necessarily "judicial" within the meaning of Article III.[3] Nor in any of the cases cited has the District court been in the incongruous position of exercising Article III power with respect to citizens praying for protection against alleged unconstitutional discrimination by its own appointees.[4] Thus none of the cited cases consider the question whether a court in the District of Columbia, or elsewhere, may, without violating due process, be required by Congress to appoint members of a board with duties unrelated to the judicial function when in so doing the court may be called upon, as it is in this case, to sit in judgment, under its Article III power, of the actions of that board with respect to the constitutional rights of citizens.

This court cannot agree with either plaintiffs or defendants that the issue as to the constitutionality or unconstitutionality of 31 D. C. Code § 101 is frivolous. The plaintiffs' motion for summary judgment and the

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[3] In Keller v. Potomac Electric Power Co., supra Note 1, the District of Columbia courts were called upon to review and where necessary to revise rates. The Court cited authorities for the proposition that making rates is a legislative act. 261 U.S. at 440-441. Rate revision, however, was a apparently considered even at that time a judicial act. See Green, Separation of Governmental Powers, 29 Yale L. J. 369, 382 (1920).

[4] For discussions of the constitutionality and propriety of legislative and executive assignments of non-judicial functions to the courts, see generally Cooley, Constitutional Limitations (8th ed. 1927); Hart & Wechsler, Federal Courts and the Federal System 13-14, 102-105 (1953), and authorities cited therein, especially the Report on the Use of Judges in Nonjudicial Offices in the Federal Government, submitted to the Senate on July 2, 1947, by the Committee on the Judiciary, Exec. Rep. No. 7, 80th Cong., 1st Sess.; Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1020-1022 (1924); Note, Constitutional Power of Courts or Judges to Appoint Officers, 16 L.R.A. 737 (1915). See also the legislative history of 31 D. C. Code § 101, 40 Cong. Rec. 5754-5764 (1906).

The principle of separating governmental powers is not, of course, applied mechanically. "In a word, we are dealing with what Sir Henry Maine, following Madison, calls a 'political doctrine,' and not a technical rule of law. * * * 'The necessities of the case,' 'to stop the wheels of government,' 'practical exposition,' are the variations in the motif of the decisions." Frankfurter & Landis, op. cit. supra, at 1014, 1015-1016 (footnotes omitted).

defendants' motion to dismiss will, therefore, be referred to the three-judge court, the necessity for which this court hereby certifies to the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 2284.

/s/ J. Skelly Wright
UNITED STATES CIRCUIT JUDGE

March 25, 1966

Summary Judgment

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 82-66

JULIUS W. HOBSON, et al.,

v.

CARL F. HANSEN, et al.

REPLY MEMORANDUM OF LAW AND FACT ON
BEHALF OF PLAINTIFFS

Plaintiffs respectfully submit this reply memorandum of law and fact in response to the brief in support of defendants' prepared conclusions of law.

The Facts

Since defendants have keyed their factual discussion to specific allegations of the complaint, plaintiffs, in replying briefly thereto, will, for the sake of convenience, refer to those same allegations.

Paragraph 13A
Allegations Pertaining to the "Track System"

The bland assertion by defendants that "the city-wide use of this device obviates the charge of racial or economic discrimination" (p.6) is utterly incomprehensible. It is precisely because it is used on a city-wide basis that it accomplishes its intended primary result -- to separate white from Negro students.

Moreover, the hardly subdued innuendo that plaintiffs oppose ability grouping per se (p. 6) is both untrue and totally unsupported by the record. Because of the reasons set forth in their main memorandum and the evidence adduced at the trial, plaintiffs wholeheartedly oppose the track system which not only separates the races but, equally important, denies quality education to Negro students. But that stance is a far cry from opposing non-discriminatory and reasonable ability grouping programs. At this juncture, it might be pointed out to the Court that prototypes of the Washington version are not used in any other major urban school system (A-3, pp. 104-17).

Various types of ability grouping programs in current usage vary for grades K-6 from groupings "within the self-contained class" (Los Angeles, San Francisco, San Diego, Miami, Baltimore, Cleveland, Concinnati and Seattle, A-3, supra, pp. 104, 105, 107, 108, 110) to groupings in special subject classes such as reading and mathematics (New Orleans, Pittsburgh, San Antonio and Milwaukee, A-3, supra, pp. 108, 109, 110). In the secondary schools, most systems do not have any rigid city-wide program of curriculum classification, but permit variation from school to school, e.g. Los Angeles, San Francisco, San Diego, Hawaii, New York and Pittsburgh (A-3, supra, pp. 111, 112, 113, 115, 117). In others, while various types of ability grouping programs exist, only St. Louis and Buffalo (A-3, supra, p. 115) utilize track systems, but even these two systems exhibit great flexibility of grouping as well as more or less continual re-evaluation of pupil placement (A-3, supra, p. 115).

The bold assertion by defendants that the basic concept of the track system "has been practiced in this school system since at least 1906 and exists in most large urban school systems" (p. 6) is untrue in both of its aspects. We have already discussed the situations existing in other major urban school systems and only wish to add that the record is barren of any reference to the 1906 origin of the "basic concept" of the track system. In their suggested findings of fact, de-

fendants merely state that "ability grouping has been practiced in the District of Columbia school system since 1906 and existed in Division 1 and Division 2 schools prior to 1954." (Findings of Fact, F-2 and 3)

The attempts of Dr. Hansen to convince the Court that the track system is nothing more or less than an extension of an already existing pattern are remarkable for their ingenuousness. While the references in defendants' findings of fact, supra, to T. 228 is totally irrelevant to the pre-1956 period, Dr. Hansen's testimony on T. 378-79 is particularly revealing. Since it speaks for itself, it is set forth here without further comment.

> Q. They were a factor. Now, prior to the institution of the track system at the tenth grade level, had there been a track system in Washington, D.C. schools?
>
> A. Now everything depends on terminology. There has been ability grouping, as I said, probably throughout the history of the secondary schools. There really existed two levels of programs in the secondary schools, one for the brighter average college bound student in which he would take what was called intensive English, algebra and what we really now call pretty much the college preparatory course and then there was a program for the slow learners and here I am not talking about the severely retarded, but the slow learners, the so-called non-academic, intensive -- the word intensive was used -- in English, general math, et cetera.
>
> So in essence, there were two levels of curriculum organization at the time we extended the program by way of the honors curriculum and downward to the basic curriculum.
>
> Q. But the track system, as we have discussed it here, and as outlined in your book, was first tried in the Washington area?
>
> A. What we call the four track system, that special designation, was started --
>
> Q. With the tenth grade?
>
> A. With the tenth grade.
>
> (T. 378-9)

The only other references in the transcript resorted to by defendants to prove their proposition that "the basic concept ... has been practiced in this school system since at least 1906" are those pertaining to Miss Lyons' zoological categories of "Bluebirds",

"Redbirds" and "Squirrels" (T. 3031). Her testimony clearly revealed the fundamental difference between the track system and what she was attempting to describe.

A. For instance, if there were 90 fourth-grade children in a building, we grouped those 90 children into three fourth grades. Well, we put probably the fastest learning fourth grades together and then the slow ones and then slower and slower. Then within those, well, say there were 30 children, then therewere little reading groups, you know.

Q. You might have the brighter students in one group or the best readers?

A. Yes, that's right, and then maybe in another and maybe five in another, but something like that.

Q. But they all had something -- all of the students, whatever reading group they were in, met together in certain activities where they all were together, isn't that correct?

A. Oh, yes, we had both -- may I tell you something else? We did a lot of social studies together. We did music.

Q. I see. So they did meet from time to time and on many occasions; isn't that correct?

A. They had to, they were all in the room.

(T. 3048-49)

* * * * * *

Q. Now, you also indicated, I believe, that there was some sort of an honors system before integration took place -- is that correct?

A. In the Negro schools?

Q. In the Negro or the white schools, I don't know?

A. I have to speak for the Negro schools.

Q. All right.

A. Just as I have tried to indicate, if you had 120 sixth grade children, you maybe had a group of those children who were exceedingly bright, but we probably did not call them honors, but within the building those children were probably grouped together for their best learning possibility, for the challenge and for their work.

Q. Was that done by a directive of the Superintendent of Schools, or was that done by the Negro teachers on their own hook?

A. It was probably done by the Negro principals. Now, all of our recommendations for organization of classes and of buildings always sentinto the Assistant Superintendent. At

* * * *

that time it was A. Kaiser Savoy, and he looked over what we did. It came in by way of supervising principals, the instance, but as supervising principal I had about 15 buildings under my care.

Q. But this was not a city-wide honors system as you knew it?

A. Not as such, but it was the same thing. It was grouping the children, just the same thing.

Q. But grouping them, as you have explained prior in your earlier testimony?

A. Yes. */

(T. 381-82)

The three curricula at the elementary school level do not, as defendants state, "differ only in the pace at which the child learns" (p. 7). As Mrs. Posey testified, "The regular curriculum is exactly what the name implies, the general plan of education, and the honors curriculum is for the accelerated child. It offers greater challenge, based on the greater curriculum, but greater challenges in work." (T. 4034. See also T. 4040, A-3, p. 49)

The term "inflexibility" as it was applied to the track system is adequately defined in the record (e.g. T. 1434). Simply stated, it means that inter-track movement is extremely rare (A-3, p. 52). For example, in 1962-63, a shade more than 4% of the elementary school special academics were upgraded (T. 332-33, B-1). Moreover, it is clear that regular pupil re-evaluation takes place at intervals of from two to three years (T. 238, 264, 334, 351-2, B-10) or not at all (T. 940, A-13).

The claim that "children in all curriculums [sic] in the junior and senior high schools are able to and do elect courses which are not within their curriculum sequence" (p. 8) is patently false (T.1192-94). "Cross-tracking is not permitted in junior high schools. On the contrary, pupils are in a 'block system', move as a group, attending all classes together." (A-3, p. 53).

The "twice yearly review required of principals of the academic records of each child in their school" (p. 9) is a myth. It does not

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*/ Miss Lyons finally admitted that "the first city-wide directive ... as far as ability grouping, came with the track system after integration ...." (T. 3082).

appear to be one of defendants' findings of fact and is thoroughly refuted by the record (e.g. T.940, A-13). Once again wishful thinking is advanced as hard fact.

Defendants claim that the District drop-out rate has fallen since the installation of the track system. The difficulty of ascertaining a reasonably accurate figure for this statistic is admirably set forth in A-3 at pp. 57-60. But there is no disputing the tragic fact that during the past five school years there have been 18,099 drop-outs as against 15,970 high school graduates (T.737, C-1 and 2, V-5).

In their attempt to sanctify the track system, defendants argue that "a pupil at school progresses academically primarily by virtue of the effort of the teacher in the classroom and not from the associations he may establish with his fellow pupils" (p. 11).*/ This generalization is, of course, unsupported by any expert testimony and defendants must rely upon that of Miss Lyons, all of whose teaching experience was gained in segregated Negro schools, to buttress it. And where, one might ask, does the premise that "where a totally heterogeneous grouping has existed, experience has shown that the thus ignored child does not long survive" (p. 11) find its authority?

True, the number of elementary school pupils in the special academic track has declined slightly (2310 in 1962 to 2485 in 1965, T.225, 1030-31, B-4), but the inordinately high percentage of Negroes continues unabated (over 95% in 1965, B-4). But of even more significance is the realization that the track system has done its work well. It successfully held the color line after Bolling until the neighborhood

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*/ Contra, "Racial Isolation in the Public Schools," United States Commission on Civil Rights, 1967, Vol. 1, at 203.

school policy could restore the Division One - Division Two structure. Only in the junior and senior high schools does it still serve a separative purpose, and there the percentages of special academics are considerably higher (T.1030-31). After all, while there is no longer any need for separative devices in an all-Negro elementary school, they may still serve a useful function at the secondary level.

Paragraph 13C

Plaintiffs contend that defendants provide predominantly white schools with plant equipment, material, supplies, and curriculum which is discriminatorily superior to those which are provided to predominantly Negro schools or schools with students from low income families.

School Construction

Defendants insist that "the installation and construction of school houses follows the demands that the population trends have made on the necessity for additional school facilities" (p. 13). They ignore the simple fact that the neighborhood school complex has prevented any meaningful integration since Bolling. The pattern is so unmistakable that no further comment is necessary. "A Court, as Chief Justice Taft stated, would be blind not to see what all others can see and understand!" State of Alabama v. United States, 304 F.2d 583 (1962).

Textbooks, Materials and Supplies

If these are allocated, as defendants claim they are, "on a simple, objective mathematical basis . . . dependent upon the number of children who attend the school" (pp.13-14), then Mrs. Posey's testimony that predominantly Negro Maury Elementary School lacked sufficient supplies (T.4090, 4097) becomes totally incomprehensible. See also A-3, pp. 50-52.

As far as libraries are concerned, defendants state that "the District has nearly as many central school libraries as Montgomery County and as many or more than the other suburban school systems" (p. 14). While this statement may be true, it is, of course, totally

misleading. The crucial statistic is, not the number of libraries, but rather whether every school has one. We are sure that the District has more libraries than many other systems but that fact begs the question. If a system containing 25 elementary schools has a library for each one, then the fact that 92 of the District's 136 elementary schools have such facilities is without statistical relevancy.

Paragraph 13G

Plaintiffs allege that defendants dismissed from or refused to appoint qualified Negroes to high administrative and policy making positions.

and

Paragraph 13H

Plaintiffs allege that defendants have failed and refused to promote Negro teachers to positions for which they were highly qualified solely because of their race or color.

Plaintiffs do not have to point to "a single individual Negro who because of racial considerations was either dismissed from or not appointed to a high administrative position for which he qualified" (p. 15). Plaintiffs have amply demonstrated the top-heavy white composition of the top five administrative classes (K-3 to 6). They have pointed out the long-standing refusal to appoint qualified Negroes to available supervisory positions in the predominantly white schools (T.2883-84, 3076).

It is no answer piously to declare "that the District of Columbia school system is populated by many Negroes" (p. 15). Plaintiffs freely admit that this is so and that it may be "quiet testimony to their competence in the positions they hold" (p. 16). But, on the other hand, it also might additionally reflect a policy to staff Negro schools with Negro teachers.

Paragraph 13J

Plaintiffs allege that defendants have assigned less experienced and/or temporary teachers to those schools attended by students who are Negro or from low income families, while assigning more experienced and/or permanent teachers to those schools with predominantly white pupil populations.

While plaintiffs agree that it is impossible to determine whether a permanent teacher is necessarily a better teacher than a temporary one, they do maintain that the former is both more experienced and better qualified. Moreover, defendants' explanation that a primary reason for more temporary teachers in a particular school is because of the need for "a particular specialization" (p. 17) certainly makes little sense insofar as the elementary schools are concerned. Further, it is obvious that whatever schools are involved, defendants' highly speculative explanation of the fact that there are considerably more temporary teachers in the predominantly Negro schools than in the predominantly white ones is wholly unconvincing, to put it mildly.

Paragraph 13K

Plaintiffs claim that defendants draw school boundary lines so as to exclude Negro and low income children from schools with predominantly white pupil populations.

Defendants admit that, while every attempt is made to "follow the neighborhood school policy, practical reasons may dictate that

some exceptions be made." (p. 20) One wonders why, if they profess themselves such fervent advocates of integrated education (T.135), they have never considered any "practical reasons" along this line, particularly when they now claim that pupil optional transfer zones exist "to provide an integrated school environment" for some students. (p. 21)

The Named Plaintiffs Lack Standing to Raise Certain Allegations Contained in Counts Two through Six of the Complaint

This outlandish and untimely contention is wholly without merit.*/ The majority in the recent three-judge court opinion deciding Count One of the complaint is dispositive of this issue. As Circuit Judge Fahy put it:

> "We also disagree with defendants' contention that plaintiffs lack standing to question the validity of Section 31-101. Suing in their own behalf and for the classes to which they belong, plaintiffs include pupils in the public schools which are administered by the Board, and parents and guardians of such pupils. [Footnote omitted.] They are clothed with sufficient interest to challenge the authority of the Board to administer the schools, an authority

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*/ Defendants' attempt to augment the record by the inclusion of the affidavit of John D. Koontz as part of their brief seems unorthodox, to say the least.

which is separately alleged, in the counts pending before Judge Wright, to be exercised in a manner which deprives them of equal protection of the law. In Baker v. Carr, 369 U.S. 186, 204, the Court stated that 'the gist of the question of standing' is,

> Have the . . . [plaintiffs] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?

"Plaintiffs are not merely federal taxpayers, as was the plaintiff denied standing in Frothingham v. Mellon, 262 U.S. 447. They are closely involved as pupils, or as parents and guardians who have the right to direct the education of children under their control, Pierce v. Society of Sisters, 268 U.S. 510, 534-35; and the education of children is an important function of state and local governments. Brown v. Board of Education, 347 U.S. 483, 493. Defendants concede plaintiffs' standing to contest the manner in which the Board administers the schools. It is but a short step to standing also to challenge the constitutionality of the basic authority of the Board to do the administering. Unless persons in the position of plaintiffs have standing to do this the issue may escape resolution. This argues for resolving doubts in favor of plaintiffs in such a case; for there is no hard and fast rule which governs standing. As Mr. Justice Frankfurter said of a 'case' or 'controversy,' whether or not standing emerges also depends in good part upon the 'expert feel of lawyers.' Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (concurring opinion). The right to take steps by judicial means not only to have the schools administered by valid methods but also to have them administered by those who may validly do so, pertains to children who under public law attend the schools, and their parents and guardians. The views of the commentators are not uniform, but we think the better view supports our position in the circumstances of this case. Compare Davis, Judicial Control of Administrative Action: A Review, 66 Colum. L.Rev. 635, 659-66 (1966) and Jaffe, Standing To Secure Judicial Review: Public Actions, 74 Harv.L. Rev. 1265, 1310 (1961), with Jaffe, Judicial Control of Administrative Action, 459-500 (1965). And see Hart and Wechsler, The Federal Courts and the Federal System, 174-75 (1953)."

In addition, it is hardly crucial for plaintiffs to include as parties qualified Negroes denied "high administrative and policy-making positions." (p. 27) Not only is it unlikely, in view of the realities of life, for such persons to risk coming forward, but it is undeniable that pupils are necessarily adversely affected by such denials and that their parents or guardians may raise this issue.

The same is true as far as teachers are concerned. Lastly, Carolyn Hill Stewart did not, as defendants baldly assert, abandon this suit. The terms of her letter disavowing counsel are in the record, but Mrs. Stewart and the other dissenting plaintiffs actively assisted counsel following its submission.

Discussion of Constitutional Distinction between De Jure Segregation and De Facto Segregation

In their herculean efforts to limit Brown v. Board of Education, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954) to their irreducible minimum, defendants repeat most of the tired (and wholly inadequate) arguments seeking to undermine these landmark decisions. In so doing, they rely chiefly on Briggs v. Elliott, 132 F. Supp. 776 (1955) and Bell v. School City, 213 F.Supp. 819, aff'd 324 F.2d 209 (1963). These two glosses on Brown are clearly inapplicable to the case at bar, the first amounting to nothing more than some gratuitous dictum*/ and the second being both factually and conceptually distinguishable.

Briggs has been severely attacked on many fronts. In Kemp v. Beasley, 352 F.2d 14, the Eighth Circuit observed that "the dictum in Briggs has not been followed or adopted by this Circuit and is logically inconsistent with Brown." (at 21) See also Judge Zavatt's masterful opinion in Blocker v. Board of Education, 226 F.Supp. 208 (1964) in which he characterized the Briggs dictum as "in a state of diminishing force, if not outright erosion." Cf. Dillard v. School Board, 308 F.2d 920, cert. den. 374 U.S. 827 (1963); McCoy v. Board of Education, 283 F.2d 667 (1960); and United States v. Jefferson County Board of Education, Fifth Circuit, Dec. 29, 1966, slip opinion, pp. 39-62.

In Bell, the court rejected plaintiffs' contention that defendants had deliberately gerrymandered school attendance zones

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*/ Cf. Aaron v. Cooper, 358 U.S. 1 (1958); Rogers v. Paul, 382 U.S. 198 (1965); Bradley v. School Board, 382 U.S. 103 (1965); Singleton v. School District, 348 F.2d 729 (1965).

in violation of their duty to integrate the school system. In so doing, it found that there had been no de jure segregation and, therefore, no state action. In the absence of the latter, the court reasoned that Brown was inapplicable.

But in Barksdale v. Springfield School Committee, 237 F. Supp. 543 (1965), on facts similar to those in Bell, the court expressly rejected the Seventh Circuit's rationale.

> "The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963). But that is not the question. The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact -- the inadequacy of segregated education -- is the same in this case, and I so find. . . . This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact. . . . I cannot accept the view in Bell that only forced segregation is incompatible with the requirements of the Fourteenth Amendment, nor do I find meaningful the statement that '[t]he Constitution . . . does not require integration. It merely forbids discrimination.' 324 F.2d at 213. . . . ¶ This court recognizes and reiterates that the problem of racial concentration is an educational, as well as constitutional, problem and, therefore, orders the defendants to present a plan no later than April 30, 1965, to eliminate to the fullest extent possible racial concentration in its elementary and junior high schools within the framework of effective educational procedures, as guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." [Emphasis added.]*

Judge Wisdom has recently put the de facto - de jure dichotomy in proper perspective. In his magnificently and exhaustively researched opinion in Jefferson, supra, pp. 68-69, he states as follows:

> "Although Brown points toward the existence of duty to integrate de facto segregated schools, [footnote omitted]the holding in Brown, unlike the holding in

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*/The First Circuit, while accepting the lower court's findings of fact, vacated its order with directions to dismiss without prejudice because defendants had initiated action identical with that directed by the court. 348 F.2d 261.

Bell but like the holdings in this circuit, occurred within the context of state-coerced segregation. The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system. [footnote omitted] Segregation resulting from racially motivated gerrymandering is properly characterized as 'de jure' segregation. See Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F.Supp. 181. [footnote omitted] The courts have had the power to deal with this situation since Brown I. In Holland v. Board of Public Instruction of Palm Beach County, 5 Cir. 1958, 253 F.2d 730, although there was no evidence of gerrymandering as such, the court found that the board 'maintained and enforced' a completely segregated system by using the neighborhood plan to take advantage of racial residential patterns. See also Evans v. Buchanan, D.Del. 1962, 207 F.Supp. 820, where, in spite of a genuflexion in the direction of Briggs, the Court found that there was gerrymandering of school districts superimposed on a pre-Brown policy of segregation."

If anything more is needed to dispel defendants' hopeful assertion that Jefferson "has no applicability to the Hobson suit" (p. 40), it is furnished by the above.

The Authority of the Board of Education to Assign Pupils to Classes According to Their Abilities

Plaintiffs do not "challenge the right of the defendants to group pupils in the public schools according to their abilities." (p.42) They do challenge their right to do so on a racially discriminatory and separative basis. Of course, many if not most major urban school systems use some form of ability grouping (A-3, pp. 104-17). It is only when these programs are motivated by considerations that flaunt the Constitution of the United States that they become legally objectionable.

That is precisely the case here. The track system originated in the frantic desire of white parents aided and abetted by obliging school officials to restore Divisions One and Two in a manner that would escape judicial detection and corrective action. It has been and is being administered in such a manner as to fill out the dead bones of de jure segregation with the live flesh of illegal subterfuge.

The lameness of defendants' arguments to sustain their particular and unique form of ability grouping is easily apparent in their reliance on Section 31-23, District of Columbia Code, 1961 ed. This provision, whose purpose is crystal clear, is hardly a justification of a system-wide curriculum classification program. To claim that it is a congressional mandate to the District to identify "the academic needs of children" (p. 42) is as unfair as it is untrue.

But that is not to say that a school system must ignore those needs. In fact, it is a prime responsibility of educators everywhere to plan their academic and vocational offerings so as to meet the requirements of their pupil populations. All that plaintiffs have any right to demand is that race and economic status play no determinative role in such formulation.

All of the cases cited by defendants in order to persuade this court to stay its hand insofar as the track system is concerned (pp. 46-48) stress the inescapable fact that, where race is a factor, all educational programs are open to judicial scrutiny and action. Likewise, defendants' fanciful contention that "the court is without jurisdiction" because certain congressional statutes give them "control of the public schools" is patently ridiculous. If this were so, then no court would ever have jurisdiction of such cases.

Lastly, defendants characterize the basic question presented herein as "whether due process of law compels defendants to intermingle, on a racial or socio-economic basis, students in the public schools of the District of Columbia. . . ." Even so inartistically portrayed,

this is hardly the only issue involved. The court is presented with a host of other questions, not the least of which is insuring that black children receive educations equal to those afforded their white compatriots.

Within the borders of the District of Columbia, as presently constituted, meaningful integration is demonstrably difficult if not impossible to achieve. But that does not mean that predominantly Negro schools are not entitled to superior teachers, sufficient and appropriate libraries, books and supplies, adequate facilities and services, and curricula designed to insure as many college-bound children as possible. Black children cannot be permitted to wither on the vine waiting in vain for white classmates. They are constitutionally entitled to equal educational opportunities on a colorblind basis. Any other approach dooms them to the bleakness of utter and abject frustration and renders us all guilty of what is perhaps the most monstrous crime of all -- indifference to the welfare of others.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR., et al., Plaintiffs v. CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al., Defendants	CIVIL ACTION No. 82-66

BRIEF SUBMITTED ON BEHALF OF PLAINTIFFS

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PRELIMINARY STATEMENT

This is a class action commenced by plaintiffs, all residents of the District of Columbia, who include children presently enrolled in the public schools thereof, their parents, and teachers. It was commenced on the 13th day of January, 1966, by the filing of a verified complaint with the clerk of this Court. In general, the complaint stated two separate causes of action, as follows:

1. Section 31-101 of the D.C. Code, the statute directing the judges of this Court to select the District's Board of Education, is unconstitutional.
2. The District's Board of Education and Superintendent of Schools unconstitutionally discriminate against plaintiffs and their classes.

All of the defendents have been served with process but no answers have at the time of the submission of this brief been received by counsel for the plaintiffs.

STATEMENT OF THE ISSUE

In connection with plaintiffs' first cause of action, they have duly asked for the convening of a three-judge court pursuant to 28 U.S.C. 2282,2284.

On January 18, 1966, Hon. J. Skelly Wright, United State Circuit Judge, sitting pursuant to 28 U.S.C. 291 (c), invited the parties hereto "to file briefs ... on the question whether the complaint presents a litigable issue, Bailey v. Patterson, 369 U.S. 31, 33, (1962), warranting the convening of a three-judge court under 28 U.S.C. # 2284.

QUESTION PRESENTED

'Whether the plaintiffs' contention that 31 D.C. Code # 101 violates Article II, Section 2, Clause 2 of the Constitution of the United States presents a litigable issue warranting the convening of a three-judge court within the meaning of Bailey v. Patterson, 369 U.S. 31, 33 (1962).

THE LAW

POINT I

The standard for the convening of a statuatory three-judge court has been established in this circuit. This Circuit recently held in Reed Enterprises v. Corcoran, No. 19, 722, decided December 2, 1965, and not yet reported, in an opinion by the Honorable Judge of this Court, that "in injunction enforcement proceedings seeking to restrain enforcement of an allegedly unconstitutional statute once a complaint 'at least formally alleges a basis for equitable relief,' a three-judge court is required. Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962)."

However, as Bailey v. Patterson, supra, so clearly states, the convening of a statutory court is not required when the unconstitutionality of a statute under attack is so clear as to present no litigable issue. This case starkly presents a classic Bailey situation as will be fully and completely demonstrated in Points II and III.

POINT II

THE JUDICIAL APPOINTMENT ISSUE PRESENTED IN THE COMPLAINT IS NOT A LITIGABLE ISSUE WARRANTING THE CONVENING OF A STATUTORY COURT WITHIN THE MEANING OF BAILEY v. PATTERSON.

A. D. C. Code 101 (1961) clearly violates Art. II, Sec. 2, Cl. 2 of the Constitution of the United States.

Sec. 31-101 of the D. C. Code reads as follows: * **

> #31-101. Qualifications and appointment--Compensation--Secretary--Meetings--Members exempt from personal liability--Costs and supersedeas bond.
>
> (a) The control of the public schools of the District of Columbia is hereby vested in a Board of Education to consist of nine members all of whom shall have been for five years immediately preceding their appointment bona fide residents of the District of Columbia and three of whom shall be women. The members of the Board of Education shall be appointed by the United States District Court judges of the District of Columbia for terms of three years each, and members shall be eligible for reappointment. The members shall serve without compensation. Vacancies for unexpired terms, caused by death, resignation, or otherwise, shall be filled by the judges of the United States District Court of the District of Columbia. The board shall appoint a secretary, who shall not be a member of the board, and they shall hold stated meetings at least once a month during the school year and such additional meetings as they may from time to time provide for. All meetings whatsoever of the board shall be open to the public, except committee meetings dealing with the appointment of teachers. The members of the Board of Education of the District of Columbia shall not be personally liable in damages for any official action of the said board performed in good faith in which the said members participate, nor shall any member of said board be liable for any costs that may be taxed against them or the board on account of any such official action by them as members of the said board; but such costs shall be charged to the District of Columbia and paid as other costs are paid in suits brought against the municipality; nor shall the said board or any of its members be required to give any supersedeas bond or security for costs or damages on any appeal whatever.
>
> (b) The judges of the United States District Court for the District of Columbia shall have power to remove any member of the Board of Education at any time for adequate cause affecting his character and efficiency as a member, after a public hearing on a verified complaint filed by the United States Attorney for the District of Columbia, or one of his assistants, and on issues framed by a verified answer. The United States District Court of the District of Columbia is empowered to promulgate rules to carry out the purpose of this subsection.

See footnotes on following page.

Footnotes

*As originally reported out of the House committee, the bill (H.R. 18442), provided for appointment of the Board of Education by the District Commissioners. (Congressional Record, 59th Congress, 1st Session, p. 5754). Mr. Foster of Vermont offered an amendment from the floor to substitute the "Supreme Court judges of the District of Columbia" for the District Commissioners as the appointing authority. (Ibid., p. 5755). Intermittent discussion ensued as to the merits of alternative means of appointment, including by the President, and of elections. (Ibid., pp. 5755-5764). But no Constitutional question was raised prior to the vote adopting Foster's amendment. (Ibid., p. 5764). Immediately after the vote Mr. Gilbert rose for the following dialogue:

> Mr. GILBERT of Kentucky. Mr. Chairman, before that question was put to the house I was clamoring to be heard in opposition to it.
>
> The CHAIRMAN. The Chair begs the pardon of the gentleman.
>
> ...
>
> Mr. GILBERT of Kentucky. ... I just wanted to remind the committee that this bill, in myjudgement, is clearly in violation of the Constitution. We had precisely a similar piece of legislation enacted by the legislature of Kentucky, conferring upon the court of appeals of Kentucky authority to appoint three commissioners like these. The court of appeals refused to exercise the function, refused to enforce that piece of legislation, and took the position that under the Constitution you could not thrust upon a judicial tribunal any legislative or executive function. The supreme court of the District of Columbia will say, "You are undertaking to load us up with certain nonjudicial duties, certain legislative and executive functions which do not harmonize with the duties of the Court, and we will refuse to execute this statute."
>
> Mr. KEIFER. Was not the decision the gentleman refers to a decision based on the provisions of the constitution of a state?
>
> Mr. GILBERT. of Kentucky. Of course, but that provision peroades the Constitution of the United States and separates the legislative, the executive, and the judicial function.
>
> Mr. KEIFER. I think we have had a similar decision in Ohio to the one the gentleman cites, but it was because of the peculiar language of the constitution of the State of Ohio. I am not familiar with the case in Kentucky.
>
> Mr. GILBERT of Kentucky. It occurred to me that this same provision existed in substantially all the constitutions, the power to appoint the school officers creating a function that was not judicial in its character.
>
> Mr. GARRETT. If the gentleman will permit me, a parallel case where the Supreme Court of the United States held in the early days of the Republic, when there was an act of Congress requiring of those judges that they perform certain duties, as I remember it, in pension claims ----
>
> Mr. GILBERT of Kentucky. Yes.
>
> Mr. GARRETT. Of the Revolutionary War.
>
> Mr. GILBERT of Kentucky. And they refused.
>
> Mr. GARRETT. And they refused.

Art. II, Sec. 2, Cl. 2 of the Constitution reads as follows:

> He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> (Emphasis added)

There seem to be only three cases in the Supreme Court that directly involve a decision as to the meaning of the relevant language of Art. II, Sec. 2, Cl. 2 of the Constitution: Ex parte Hennen, 13 Pet. 230 (1839), a case decided by relative contemporaries of the drafters of the Constitution; Ex parte Siebold, 100 U.S. 371 (1879), a Reconstruction Era case; and Rice v. Ames, 180 U.S. 371 (1901), a rather uninformative case that leaves the Hennen and Siebold cases as the Key pronouncements of the Supreme Court on the meaning of the pertinent Constitutional lauguage.

1. Ex parte Hennen, supra

Duncan Hennen had been serving as the Clerk of the U.S. District Court for the Eastern District of Louisiana. The District Judge then wrote Henner informing him of his removal and of the appointment of another. Hennen petitioned the Supreme Court for a writ of mandamus to the District Judge reinstating him as clerk. The Court

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Footnotes (Cont.)

Mr. GILBERT of Kentucky. The same doctrine has been announced by the Supreme Court of the United States, by the supreme court of Ohio, and by numerous other supreme courts, and I take it the statute will be null and void if it is enacted. That is all I have to say. (Ibid., p. 5764)

** Though not emphasized specifically in the Brief, the removal duties placed upon the Federal District Judges by subsection (b), as well as the relatively short terms of the Board members, even more increase the Judges' executive control over the Board of Education.

dealt with the Constitutional origin of the power to appoint a court clerk:

> By the Constitution of the United States (art. 2, sec. 2), it is provided that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint certain officers therein designated, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may be law vest the appointment of such inferior officers as they shall think proper in the President alone, in the courts of law, or in the heads of departments. The appointing power here designated in the latter part of the section was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. Congress, in the exercise of the power here given by the Act of the 24th of September, 1789, establishing the judicial courts of the United States (1 Story's Laws U.S., 56, sec. 7), declare that the Supreme Court and the district courts shall have power to appoint clerks of their respective courts; and that the clerk for each district court shall be clerk also of the Circuit Court in such district. (at pp. 257-258)

2. Ex Parte Siebold, supra.

The fifth point of Siebold (at pp. 396-398) deals directly with the relevant language of Art. II, Sec. 2, Cl. 2 in the context of the period of greatest internal turmoil in the history of the United States. But of course the law must serve for periods of stress as well as for those of relative calm and prosperity. The remarkable thing is that Siebold -- far from straining the basic Constitutional principle of the separation of powers -- beautifully illustrates the vitality of that principle in the time of our nation's greatest crisis.

Siebold was a judge of elections at one of the Baltimore election precincts in the Congressional election of 1878. The Congress had just enacted the Enforcement Act of 1870, partially codified as Title xxvi, sections 2002 to 2031 of the Revised Statutes (2nd ed. 1878). The criminal provisions of the Act were found in

Title lxx, Ch. 7, 5506 to 5532 of the Revised Statutes. Siebold was arrested, tried and convicted of interfering with the federal election supervisors in the performance of their duties at the polling place. Siebold sued for habeas corpus in the Supreme Court. Siebold and his co-defendants* contended that the supervisors of elections were unconsitutionally appointed officials in violation of Art. II, Sec. 2, Cl. 2, since the Enforcement Act vested the power of their selection in the Circuit Court**.

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* Four other election judges in the City of Baltimore.
** (Note that the versions of 2011 and 2012 appearing in the Court's opinion are counsel's paraphrasing and not the verbatim statutory language set out below.)

> Sec. 2011. Whenever, in any sity or town having upward of twenty thousand inhabitants, there are two citizens thereof, or whenever, in any county or parish, in any congressional district, there are ten citizens thereof, of good standing, who, prior to any registration of voters for an election for Representative or Delegate in the Congress of the United States, or prior to any election at which a Representative or Delegate to Congress is to be voted for, may make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town, county or parish, is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judges, within not less than ten days prior to the registration, if one there be, or if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit.
>
> Sec. 2012. The court, when so opened by the judge, shall proceed to appoint and commission, from day to day and from time to time, and under the hand of the judge, and under the seal of the court, for each election district or voting precinct in such city or town, or for such election district or voting precinct in the congressional district, as may have applied in the manner hereinbefore prescribed, and to revoke, change or renew such appointment from time to time, two citizens, residents of the city or town, or of the election district or voting precinct in the county or parish, who shall be of different political parties, and able to read and write the English language, and who shall be known as supervisors of election.

Siebold cited Hennen and argued that the federal supervisors of elections were not officials appropriate or proper to the functions of the federal judiciary. The Supreme Court stated:

> Finally; it is objected that the Act of Congress imposes upon the circuit court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the Courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.
>
> The Constitution declares that "The Congress may, be law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it whould be in the President alone, in the Department of Justice, or in the courts. The Marshal is preeminently the officer of the courts; and, in case of a vacancy, Congress has sn fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.
>
> But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better that it should rest there, that then the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made, Ex parte Hennen, 13 Pet., 258, that the appointing power in the clause referred to "Was, no doubt, intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The Law of 1792, 1Stat. at L., 243, which required the circuit courts to examine claims to revolutionary pensions, and the Law of 1849, 9 Stat. at L., 414, authorizing the District Judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American Army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.
>
> In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts. (at pp. 396-398)

In essence, the Court broadly generalized that the Hennen Court was engaging in unnecessary dictum and that the Constitutional language meant that department heads and federal judges could appoint, when given that power by Congress, any federal officials in any branches of the government unless otherwise provided for in the Constitution. Then the Court concludes that , in connection with the appointment of supervisors of elections, not only are the circuit courts as appropriate as the President or department heads, but are indeed more appropriate in so far as these officials are concerned.

In short, the Court at first rejects the Hennen interpretation of the Constitutional language and then explicitly adopts it, applying it to decide the issue presented by Siebold. Moreover, the Court even supports Hennen more generally when it says:

> "...and in the present case there is no such incongruity in the duty required as to excuse the courts, from its performance, or to render their acts void." (underlining added) (at p. 398)

At this point, even from a reading of Siebold without further research, one must conclude that, although at first using language that seems to impair somewhat the Hennen position, the Court essentially reiterates it and immediately procedes to apply the Hennen standard to reject Siebold's point.

However, when the entire Title of the Revised Statutes ("The Elective Franchise") is studied, it becomes quite clear that the Court was dealing with a case that fell squarely within Hennen. Unfortunately, the Court's opinion in Siebold leaves the impression that supervisors of elections were federal officials with broad, far ranging powers of general supervision and control. Nothing could be further from the truth; indeed, the "supervisor" of elections was empowered to do just what the root latin means, "look over" and no thing more.

The Enforcement Act election provisions were based upon the concept of jusicial resolution of contested elections. Sec. 2010, which was not cited in Siebold, gave the circuit courts the jurisdiction to decide the title to offices other than those of Presidential Electors, Members of the

House, and state legislators* when the denial of the right to vote on account of race infected the result of the election. The statute, which appears today as 28 U.S. C. 1344, cites the 15th Amendment as its direct authority. Moreover, the powers to adjudicate contested elections involving Presidential Electors and Members of the House were already Constitutionally vested in the Congress and in the House.** But even here here the contested elections statutes governing House elections*** vested the federal judiciary with authority to preside over the taking of depositions, an authority in aid of the power of Congress to adjudicate these matters.****

---

* - Sec. 2010. Whenever any person is defeated or or deprived of his election to any office, except elector of President or Vice-President, Representative or Delegate in Congress, or member of a State legislature, by reason of the denial to any citizen who mayoffer to vote, of the right to vote, on account of race, color, or previous condition of servitude, hisis right to hold and enjoy such office, and the emoluments thereof, shall not be impowered by such denial; and the person so defeated or deprived may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit court or district court of the United States of the circuit or district in which such person resides. And the circuit or district court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fourteenth article of amendment to the Constitution of the United States and secured therein.

This presently almost never-used statute was the basis (as amended by the "technical" revisions of fJune 25, 1948, to include the United States Senate) for the now famous litigation in the Fifth Circuit contesting then United States Senator-electoLyndon Johnson's election in 1948. (Johnson v. Stevenson,170 F.2d 108 (C.A. Tex., 1948)). The Court held the statute inapplicable by its own terms, since United States Senators were explicitly excepted, and dismissed the litigation.

** Art. I, Sec. 5, Cl.1, and Sec. 8, Cl. 18, U. S. Constitution; and the 17th Amendment was yet to be adopted.

*** Title II, CH. 8 of the Revised Statutes; now codified as 2 U.S.C. 201-226.

**** Ibid., Sec. 110; now codified as 2 U.S.C., 206.

In essence, then, the Enforcement Act funneled election contests into the federal judiciary as the enforcement agency for the 15th Amendment's protection of the right to vote regardless of race. Seen in this light, it becomes clear that the supervisors were at the least ancillary to the judicial process. But this analysis just scratched the surface of their full judicial nature.

The Chief Supervisor for the judicial district is appointed by the circuit judge from among his circuit court commissioners. (Sec. 2025) In addition to the supervision of his subordinates his function is solely to inform the court. (Sec. 2026). The individual supervisors are appointed by the circuit judge, two for each precinct, on a petition filed by either two citizens or a municipality or by ten citizens of a county. (Sec. 2011)* The court may at any time modify, change, or alter the appointment of the supervisors. (Sec. 2012)** In Congressional election matters, the Chief Supervisor*** also files all materials with the House of Representatives****, as well as with the court under his direct responsibility. Finally, Sec. 2029 reads:

> Sec. 2029. The Supervisors of election appointed for any county or parish in any Congressional District, at the instance of 10 citizens, as provided in Sec. two thousand and eleven, shall have no authority to make arrests, or to perform other duties than to be in the immediate presence of the officers holding the election and to witness all thier proceedings, including the counting of the votes and making of a return thereof.

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* See note ** on page -7-

** Ibid.

*** Appointed by the circuit court from among its commissioners (Sec. 2025) to report directly to the court (Sec. 2026).

**** Sec. 2020. .../ P/rior to the assembling of the Congress for which any such Representative or Delegate was voted for he shall file with the Clerk of the House of Representatives all the evidence by him taken, all ifnormation by him obtained, and all reports to him made.

Parenthetically, it should be added that Sec. 2021* creates the office of special deputy marshal, appointed by the U. S. Marshal for each precinct in such numbers as to protect the election supervisors in the performance of their duties. In essence, Congress recognized clearly in the Enforcement Act itself the proper and appropriate lines of appointment for the functions it had created. As to the election supervisors, it seems quite obvious that they lacked even the authority of most special masters in the present federal practice, though perhaps this denomination would best describe them.

It is not out of place to note that the Civil Rights Act of 1960 creates a federal referee system that is quite similar to the scheme of the Enforcement Act of 1870**. The relevant differences are that (1) in the 1960 Act, the Attorney General institutes the proceeding for the appointment of the referees, whereas in the 1870 Act a citizens' petition begins the process, and (2) the federal referee exercises far more authority than the supervisor of elections.

---

* Sec. 2021. Whenever an election at which Representatives or Delegates in Congress are to be chosen is held in any city or town of twenty thousand inhabitants or upward, the marshal for the district in which the city or town is situated shall, on the application, in writing, of at least two citizens residing in such city or town, appoint special deputy marshals, whose duty it shall be, when required thereto, to aid and assist the supervisors of election in the verification of any list of persons who may have registered or voted; to attend in each election district or voting precinct at the times and places fixed for the registration of voters, and at all times and places when and where the registration may by law be scrutinized, and the names of registered voters be marked for challenge; and also to attend, at all times for holding elections, the polls in such district or precinct.

**Pub. L. 86-449, Sec. 601(a); 42 U.S.C. 1971(e).

3. Rice v. Ames, supra.

Rice called into question the power of Congress to authorize the U.S. District Courts to appoint U. S. Commissioners in the contest at their duties in extradition cases. The Court rejected the attack, saying:

> 4. The fifth assignment questions the constitutionality of Rev. Stat. # 5270, first, because it does not provide for any mode of procedure relating to continuances, change of venue, bail, etc., before commissioners appointed in extradition matters; second, because Congress had no power to confer upon a district judge of the United States authority to create such inferior courts; third, because Congress has not created such court and established its jurisdiction. We are unable to appreciate the force of this objection. Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under art. 2, #2, //2 of the Constitution, to invest the district or circuit courts with the power of appointment. The only qualification required of a commissioner to act in extradition cases is that suggested by Rev. Stat. #5270, that he shall be "authorized so to do by any of the Courts of the United States." We know of no authority holding that Congress may not vest the courts with this power, and we are reluctant to create one.

The striking thing about both the Hennen and Siebold cases is that neither opinion* indicates the proceedings of the Constitutional Convention of 1787 were consulted on the point at issue. This research would seem to be logically of great, and perhaps decisive, import. Indeed, such is the case. The Constitutional Convention, in the very vote inserting this provision in the Constitution, in unambiguous terms, made crystal clear exactly what it meant.

The inquiry opens with the presence of the word "alone" following the word "President". Was it necessary to emphasize that the President was just one person, was some sort of joint appointing powers being conferred, or just what was the meaning of "alone"? In Madison's supplemental notes made during the Convention proceedings in Ferrend's fourth volume of Records of the Federal Convention of 1787**, one notices thath he sets forth the critical language as follows:

> in the President alone-- in the Courts of Law, or
> in the Heads of Departments (at p. 60)

The dash, of course, would indicate a distinction between the category of the President and the judiciary and the department heads.

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* Nor do the headnotes or argument of counsel so indicate.

** Max Ferrand, Records of the Federal Convention of 1787 (Yale Univ. Press: 1937).

The Convention's restrictive views on the extent of the appointive power are dramatically presented on Pages 627-8 of Volume II, Ferrend's Records, supra.

> Art. II Sect. 2. (paragraph 2) To the end of this, Mr. Governr. Morris moved to annex "but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments". Mr. Sherman 2nded the motion.
>
> Mr. Madison. It does not go far enough if it be necessary at all-- Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.
>
> Mr. Govr. Morris. There is no necessity. Blank Commissions can be sent--
>
> On the motion
>
> ....
>
> /Ayes --5; noes --5; divided --1/
>
> The motion being lost be the equal division (of votes). It was urged that it be put a second time, some such provision /628/ being too necessary, to be omitted. and on a second question it was agreed to nem. con.

The Convention, faced with the problem of an excessive burden upon the President, realized that it was advisable to drop the residual appointment power onel evel below the apex of appointive power. This level was, of course, the heads of departments in the executive and the judges in the judicial branch*. Graphically expressed, the concept is one of a pyramid with the President at the top and the heads of departments and the federal judiciary forming the second level. Madison raised the question of the advisability of going down to a third level in the executive establishment, but this was not pressed. Each level was to have the appointment power over lesser officers within its own sphere of responsibility. Any suggestion that this provision meant that the Congress could have vested the power to appoint the inferior officers of the United States in the federal judges would have stunned the members of the Convention. One need only repeat the citation of this Court of pp. 13-14 in Hart & Wechsler, supra, to illustrate the Convention's views on this principle.

* Specific provisions of the Constitution had already dealt with officers of the Congress; Art. I, Sec. 2, Cl. 5 and Sec. 3, Cl. 5.

B. Public Policy Supports a Limitation of the Appointive Power In the Judiciary.

It is highly relevant and necessary to consider the results and implications of a holding by this Court that the language of Art. II, Sec. 2, Cl. 2 of the Constitution authorizes the Congress to vest in the federal judiciary the appointment power over any or all of the lesser officers of the United States.*

The United States is a nation requiring the services of a multitude of functionaries performing duties of immensely diverse character. Examples of a few are: District Directors of Internal Revenue, U. S. Attorneys, local Selective Service Boards, county ASCS committees, wage and hour inspectors, agricultural expansion agents, highway program supervisors, FHA housing inspectors, bank supervisors, administrators of the poverty program, the Peace Corps and AID programs. If the Constitutional language means that the Courts can be given the duty to appoint such officials, then it seems clear that the Constitution authorizes the Congress to vest the federal courts with major executive power. Moreover, appointments of limited duration (as illustrated by the staggered 3-year terms in the case at bar) could give even lighter control to the judiciary.

But the consequences of sucn an interpretation of Art. II, Sec. 2, Cl. 2, are frightening to contemplate. Federal officials and the U. S. Government are responsible agents — their acts and omissions create legal rights, duties and status and they can sue and be sued for the whole range of judicial remedies in the federal courts. It directly follows that, unless Clause 2 is maintained in the limited fashion clearly envisioned by the framers, judges could be more involved in defending themselves and their agents than in administering justice. And the independence of the judiciary to render that justice would be riddled with statutory bias, interests, prejudice, and concern as a result of non-judicial duties placed upon the federal judges.

---

* It is also relevant to notice the existing instances of placement of extra-judicial duties on judges. 20 U.S.C. 42 provides that the Chief Justice shall be a member of the Board of Regents of the Smithsonian Institution. Hart & Wechsler's Federal Courts and the Federal System lists a few instances of federal judges receiving extra-judicial appointments at pp. 102-105 and contains otherwise pertinent material at pp. 95-114.

The power to appoint vests the correlative of the right to petition for redress of grievances in the people affected by such appointment. If the judiciary allows these responsibilities of appointment and control to be foisted upon it, then it cannot Constitutionally deny the right of the people under the First Amendment to look to the courts for redress of grievances arising from the exercise of non-judicial powers. For example, 18 U.S.C. 1507 makes it a crime to interfere with the exercise of judicial responsibilities in buildings housing federal courts. Surely this statute would be unconstitutional pro tanto as the judiciary becomes increasingly vested with appointment powers by the Congress and the people desire to petition the courts for the redress of grievances based on the exercise of those very powers. In short, federal judges can now be the objects of picketing, demonstrations, and lobbying.

Finally, what is now the meaning of the independence of the federal judiciary? It seems clear that the improper and incorrect interpretation of the Constitutional language would bring about the condition that, through the extensive use of the appointment power, Congress could utterly destroy the independence of the judiciary and obliterate Article III of the Constitution. To state the proposition is to answer it on public policy grounds as to the issue presented here.*

---

* "The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties." (Cardozo, Ch.J., in Matter of Richardson, 247 N.Y. 401, 160 N.E. 655, 661 (1928).)

POINT III

THE JUDICIAL APPOINTMENT ISSUE IS NOT LITIGABLE AND IS FORECLOSED FOR THE FURTHER SEASON THAT THE UNBROKEN DECISIONS OF THIS COURT, THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND THE SUPREME COURT OF THE UNITED STATES HAVE HELD THAT EXECUTIVE FUNCTIONS MAY NOT BE PLACED UPON AN INDEPENDENT JUDICIARY BASED UPON ARTICLE III OR EVEN ARTICLE I OF THE CONSTITUTION.

It is the height of understatement to say that the Constitutional status of the courts of the District of Columbia has been the subject of some judicial uncertainty. The latest case in which the Supreme Court has dealt with the issue seems to be Glidden v. Zdanok, 370 U. S. 530 (1962). The Court typically split into various factions and sub-factions but held that the Court of Claims and the Court of Customs and Patent Appeals were Art. III courts whose judges were protected by the tenure and salary provisions of Article III and could sit by designation and assignment on cases coming within the general jurisdiction of the federal courts. Mr. Justice Harlan, speaking for himself and two of his brethren, wrote the majority opinion in which he discussed the courts of the District of Columbia. In his words:

> The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in Kendall v. United States (US) 12 Pet 524, 619, 9 L ed 1181, 1218.
>
> "There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice."
>
> Thus those limitations implicit in the rubric "case of controversy" that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, Records of the Federal Convention (1911), 45-46, need have no application in the District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts.[54]
>
> But those are not the only limitations embodied in Article 3's restriction of judicial power to cases or controversies. The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to "cases of a Judiciary nature," see II Farrand, op cit., supra, at

430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article 3 court.

Footnote 54 is quite significant and is as follows:

"54. The DC Code, 1961, Tit 11, c 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. Byers v McAuley, 149 US 608, 619, 37 L ed 867, 872, 13 S Ct 906. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, DC Code §11-306; see Bottomley v Bottomley, 104 App DC 311, 262 F2d 23, are beyond the ken of the federal courts in the States. Ohio ex rel. Popovici v Agler, 280 US 379, 383, 74 L ed 489, 496, 50 S Ct 154.

The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, DC Code, §§ 31-101, 21-308, is probably traceable to Art 2, § 2 of the Constitution. See note 10, supra; Ex parte Siebold, 100 US 371, 397, 398, 25 L ed 717, 726." (underlining added)

It is noteworthy that in the very discussion of the jurisdiction of the Courts of the District of Columbia there seemed to be no thought in footnore 54 that that jurisdiction would be susceptible to such distortion as to sustain the power to appoint the School Board by the judges of this Court. Indeed, the Justices could only cite the key language in Art. II, Sec. 2, Cl. 2 as the "probable" source of the power.* As has been pointed out in Point II, such an interpretation is utterly foreclosed.

---

* Mr. Justice Harlan's citation of the Board of Mental Health as being in a category similar to the Board of Education seems incorrect.

The District of Columbia Code, Tit. 21 sec. 308, establishes a "Commission on Mental Health . . . which shall examine alleged insane persons, inquire into the affairs of such persons, and the affairs of those persons legally liable as hereinafter provided for the support of said alleged insane persons, and make reports and recommendations to the court as to the necessity of treatment . . . of such insane persons. The said commission shall be drawn from a panel of nine, who shall be appointed by the judges of the United States District Court for the District of Columbia. (underlining added)

Significantly, the statute provides that "The said commission shall act in all respects under the direction of the equity court." (§ 21-308) (underlining added) "The form of the commission, i.e. two physicians and one lawyer, was taken from the laws of Pennsylvania, which provide for a commission to be appointed in each case. The idea of a permanent body to be paid by the District of Columbia was suggested by the large number of such cases, the territorial

The question then arises as to what is meant by the broad language so commonly used to the effect that the courts of the District may exercise "legislative and administrative" or "non-judicial" functions as well as Article III judicial functions*. Perhaps the key lies in the language of Mr. Justice Curtis in Murray v. Hoboken Land and Improvement Co., 18 How. 272 (1856) and in the words of Mr. Justice Brandeis in Tutun v. U.S., 270 U.S. 568 (1926).

Murray was a case challenging the attempt of the United States to recover missing funds from the former Collector of the Customs for the Port of New York through summary levy on the Collector's personal real property. An Act of Congress provided for the summary proceedings by audit and then warrant issued by the Solicitor of the Treasury. The Collector's successor in title by sale attacked the statutory summary proceedings as unconstitutional. In upholding the statute, Mr. Justice Curtis said:

> It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject matter under its cognizance, it was not for the government to say that the subject matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not have conferred on the District Court power to determine it upon a bill filed by the Collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the District Court to pass upon it, is conclusive evidence that it is a judicial controversy.

(contd) limits of the District of Columbia, and the fact that there is only a limited number of persons qualified to act practicing within the District of Columbia." Senate Report 1689, 75th Congress. "The statute . . . was passed in 1938 in recognition of the fact that the assistance of unbiased experts was essential to assist courts in dealing with insanity cases." De Marcos v. Overholser, 137 F. 2d 698 (D.C. Cir. 1943).

* Parenthetically, Hart & Wechsler, supra at p. 349, pointedly pose the question: "Is there any satisfactory explanation of why a fusion of judciial and non-judicial functions in the same tribunal is objectionable in constitutional courts outside the District of Columbia but not in inferior constitutional courts inside it?"

> We cannot admit the correctness of the last position. If we were of opinion that this subject matter cannot be the subject of a judicial controversy, and that consequently it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. ...
>
> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. ...

In short, the Court felt that the federal judiciary could not involve inself, either voluntarily or by Act of Congress, in matters essentially not of a judicial character and not presented in a judicial posture. The Court realized that many matters not basically of a judicial nature may be presented in a judicial posture appropriate for the exercise of jurisdiction and therefore within the Constitutional authority of the federal courts.

In Tutun, which raised the issue of the constitutionality of circuit court of appeal jurisdiction of naturalization proceedings, speaking for the Court, stated:

> The function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our government. See Act of March 26, 1790, chap. 3, 1 Stat. at L. 103. The Federal district courts, among others, have performed that function since the Act of January 29, 1795, chap. 20, 1 Stat. at L. 414. The constitutionality of this exercise of jurisdiction has never been questioned. If the proceeding were not a case or controversy within the meaning of art. 3, §2, this delegation of power upon the courts would have been invalid. Hayburn's Case, 2 Dall. 409, 1 L. ed. 436; United States v. Ferreira, 13 How. 40,

> 14 L. ed. 42; Muskrat v. United States, 219 U.S. 346 55 L. ed. 246, 31 Sup. Ct. Rep. 250. Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself, and provide only an administrative remedy. United States v. Babcock, 250 U.S. 328, 331, 63 L. ed. 1011, 1012,39 Sup. Ct. Rep. 464. (at p. 576)

It seems, then, that these two further cases have dealt to a degree with the limit of the power of the federal judiciary over the "legislative" or "administrative" functions involved in such cases as Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930); O'Donoghue v. United States, 289 U.S. 516 (1933); and Ex Parte Bakelite Corporation, 279 U.S. 438 (1929). Clearly those cases, and, indeed all others that have come to the attention of counsel are solidly consistent with the limitation that the matter be presented in a judicial posture and be susceptible to judicial determination.* The decision of this Court in United States ex rel. Brookfield Construction Co. v. Stewart, D.D.C., 234 F.Supp. 94, 98, affirmed, 119 U.S. App. D.C. 254, 339 F. 2d 753 (1954), called to the parties' attention by the Court, squarely limits the duties and responsibilities which can be placed by the Congress on the U.S. District Court for the District of Columbia. **

8

* The Administrative Procedure Act is of some interest in this connection.

** The District Court's jurisdiction traceable to Congress' power over the District of course gives this Court a general plenary jurisdiction not possessed by other Federal Courts. Bottomley v. Bottomley, 262 F. 2d 23. But this Court only has exercised jurisdiction over or in conjunction with matters susceptible to judicial determination and presented in a judicial posture -- except for the Board of Education appointment power conferred by 31 D.C.Code §101. The Courts' of the District regulatory commission review jurisdiction is quite consistent with this principle.

Of some value is an inquiry into the practice in the other states of the Union, particularly the State of Maryland. Almost every state has an explicit constitutional provision, a constitutional decision by its highest court, or both, prohibiting the legislature from placing non-judicial functions such as the appointment of executive officers on the judiciary. * There are a few apparent exceptions that allow some impingement on the judiciary. ** However, Maryland, the predecessor sovereignty of the District of Columbia, has had an explicit prohibition in its Declaration of Rights since 1776 and the decisions of the Maryland Court of Appeals interpret this prohibition to void appointive arrangements far less excessive than presented in the case at bar. ***

Although his reasoning dealt with the tenure and salary of the judges of the courts of the District, Mr. Justice Sutherland's language in O'Donoghue (at p. 540) seems equally relevant here :

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases heard and determined by federal courts created under, and vested with the judicial power conferred by, Art.III. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union. ****

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* (This footnote and the following one are not based upon the depth of research desirable, due to time limitations.)

Alaska, Ariz., Cal., Colo., Conn., Ga., Hawaii, Iowa, Mont., Neb., Nev., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Ore., R.I., Tenn., Tex., Utah, Vt., Va., W. Va., Wisc., Wyo.; Florida, Kan., N.H., and Pa. seem unclear.

** Idaho, Ind., S.C., and Wash.

***Board of Supervisors of Election for Wicomico County v. Todd, 97 Md. 247, 54 A. 963, (1903).

**** Supporting this conclusion is the decision of the U.S. Court of Appeals for the District of Columbia in Pang-Tsu Mow v. Republic of China, 201 F. 2d 195 (1952),

(contd) involving the question of the jurisdiction of the District Court for the District of Columbia over suits between aliens. The Court stated:

> (a) Defendants contend the District Court was without jurisdiction to give relief by preliminary injunction or otherwise because Article III, Section 2, Clause 1, of the Constitution, in its definition of the judicial power of the United States, does not include a suit between aliens. This provision relates to the scope of Federal judicial power in a general sense without special reverence to the District of Columbia. The considerable judicial residuum not granted to the United States remains with the several states and, since there is no state jurisdiction in the District of Columbia, appellant argues that a sort of judicial vacuum exists here with respect to actions and parties not covered by the power granted to the Federal judiciary under Article III. But we think it clear the founders avoided this result by the terms of Article I, Section 8, Clause 17, of the Constitution, which provides that Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over such District (of Columbia)***." This provision is to be harmonized with Article III, Section 2, Clause 1. National Mutual Ins. Co. of Dist. of Columbia v. Tidewater Transfer Co., 1949, 337 U.S. 582, 69 S.Ct. 1173, 93 LEd. 1556. The Harmonizing process leads inevitably to the conclusion that when parts of Maryland and Virginia became originally incorporated within the District of Columbia the authority of Congress over this ceded area, resting upon Article I, was sufficient to enable it to clothe the courts here with jurisdiction like that left behind in Maryland and Virginia. (underlining added)

POINT IV

Conclusion

Plaintiffs respectfully submit that a litigable issue is not presented within the meaning of Bailey v. Patterson, 369 U.S. 31 (1962) in that the controversial issue is clearly foreclosed in favor of Plaintiffs.

Respectfully submitted,

_____

William M. Kunstler

William L. Higgs,
Of counsel

CERTIFICATE

I, William, M. Kunstler hereby certify that I have this day served a copy of this brief on attorneys for Defendants.

February 11, 1966.

_____

William M. Kunstler

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 134 September Term, 1965
Civil Action No. 82-66

Julius W. Hobson, individually and on behalf of Jean Marie Hobson and Julius W. Hobson, Jr., et al.,
Plaintiffs,

v.

Carl F. Hansen, Superintendent of Schools of the District of Columbia, et al.,
Defendents.

FILED
JUN 1 1966
ROBERT M. STEARNS, CLERK

ORDER

BAZELON, Chief Judge: This motion raises an important question concerning the administration of statutory three-judge District Courts convened under 28 U.S.C. §§2282 and 2284 (1964). The complaint in this action consists of six counts. Count one asserts unconstitutionality as grounds for enjoining the enforcement of D.C. Code §31-101(a) (1961), which requires the judges of the United States District Court for the District of Columbia to appoint a board of education for the District. Counts two through six allege various racial and economic discriminations by school authorities against school children and teachers and ask for their abatement by injunction.

Circuit Judge Wright, sitting by assignment in the District Court, requested me, as Chief Judge of the Circuit, to convene a three-judge District Court pursuant to 28 U.S.C. §2284 to hear the constitutional challenge to D.C. Code §31-101(a).[1/] After examining the complaint and other records in the case, I exercised my authority under §2284 to determine whether substantial constitutional issues were raised.[2/]

1. Hobson v. Hansen, 252 F.Supp. 4 (D.D.C. 1966).

2. Cf., California Water Serv. Co. v. City of Redding, 304 U.S. 252 (1938); Miller v. Smith, 236 F.Supp. 927 (E.D.Pa. 1965), motion for leave to file petition for writ of mandamus denied sub. nom., Miller v. Biggs, 382 U.S. 305 (1965); Red Lion Broadcasting Co. v. FCC, Three-Judge File No. 129, D.C.Cir., Dec. 2, 1965, motion for leave to file petition for writ of mandamus denied sub. nom., Red Lion Broadcasting Co. v. Bazelon, ___ U.S. ___ (Misc. No. 1316, May 31, 1966).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 134 September Term, 1965
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I then convened a three-judge court on March 29, 1966, to which I referred only count one of the complaint. My stated purpose was to leave counts two through six before Judge Wright in his capacity as a single-judge District Court.

In the present motion, the defendants request me to expand my order convening the three-judge court to include the issues raised and relief requested in counts two through six. They contend, citing authorities,[3/] that "a three-judge court, once impanelled under 28 U.S.C. §2284, has complete jurisdiction over the entire case and neither a single-judge court nor the chief judge of the circuit has the power to divest the three-judge court of its jurisdiction."[4/] In the context of this case, I disagree.

The cases upon which defendants rely are based on concepts of pendent jurisdiction. They hold that where a statute is sought to be enjoined on federal constitutional grounds, as well as on either state law or federal statutory grounds, the three-judge court has authority to hear all the legal theories advanced against the validity of the statute. The rationale of these cases is two-fold: first, that non-constitutional grounds should be available to the three-judge court so that it may, if possible, avoid constitutional decision; and second, that since the different legal theories all rest upon a single complex of facts,

3. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); Chicago G.W. Ry. v. Kendall, 266 U.S. 94 (1924); Louisville & N. R.R. v. Garrett, 231 U.S. 298 (1913); Firemen's Ins. Co. v. Beha, 30 F.2d 539 (S.D.N.Y. 1928), aff'd sub. nom., Firemen's Ins. Co. v. Conway, 278 U.S. 580 (1929).

4. Since Judge Wright requested a three-judge court only for count one (Hobson v. Hansen, supra note 1), the question arises whether the Chief Judge's authority, ministerial or discretionary, may be extended to counts two through six.

judicial efficiency will be best served if all the challenges to the statute are heard at one time by one tribunal.[5/]

The present case is in sharp contrast. Here count one is in no way related to counts two through six, except for the identity of certain defendants. The statute under attack in count one is not challenged or even adverted to in the remainder of the complaint. A decision on the constitutionality of the statute cannot, therefore, be avoided by a decision on the claims in counts two through six, nor can a consideration of the issues raised in those counts contribute in any way to resolution of the constitutional question presented in count one. In addition, there is no identity between the factual issues underlying count one and those of the rest of the complaint. Count one and counts two through six thus present wholly separate and independent claims, albeit against the same defendants.[6/] As such, the rationale of pendent jurisdiction and the cases relying on that doctrine are inapposite here.[7/]

5. See, e.g., cases cited in note 3 supra; Sterling v. Constantin, 287 U.S. 378, 393-94 (1932); Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv. L. Rev. 817, 833-45 (1960).

6. This joinder of claims, of course, has been sanctioned since 1938 by Rule 18(a), Fed. R. Civ. P. Since most of the cases upon which defendants rely were decided prior to 1938, the situation presented here was not and could not have been contemplated by the Supreme Court. For this reason, the broad language of these opinions, which might be read to support defendants' arguments, must be qualified by reference to the facts of those cases--an attack upon a single statute based upon one underlying factual matrix.

7. Count one of the complaint has been fully briefed and argued to the three-judge court and has been submitted to it for well over a month. The defendants' tardiness in moving to certify counts two through six to the three-judge panel shows that they were not hampered in any way during the hearing on count one by the absence of joinder and further

(continued on page 4)

Moreover, defendants' argument that, because count one of the complaint requires a three-judge District Court, counts two through six must be submitted to that statutory court misconceives the function of the three-judge court. "The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant delay and expense. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended." Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U.S. 386, 391 (1934). To allow joinder of claims unrelated to the legislation under attack would severely undermine the sharply limited purpose for three-judge courts, at heavy cost to judicial administration both in the lower federal courts and in the Supreme Court.

I therefore conclude that since only count one of the instant complaint challenges an Act of Congress on constitutional grounds,[8] and since the remainder of the complaint raises wholly separable and unrelated claims based on different facts and challenging different acts by the

7 demonstrates that count one and counts two to six are wholly unrelated. That the motion to join the counts comes so late in the proceedings and that this delay is unexplained may suggest that the motion was interposed for purposes of delaying trial on the merits of counts two through six. Since counts two through six allege racial discrimination resulting in irreparable damage to school children, time is of the essence for trial of those issues.

Defendants make the additional argument that if D.C. Code §31-101(a) is declared unconstitutional by the three-judge court, the social discriminations alleged in counts two to six may not be continued by the Board's successors. This possibility, however, is totally unrelated to the constitutionality of §31-101(a). Moreover, the timing of and necessity for a trial of counts two to six are matters which should be addressed to Judge Wright. Cf. Public Serv. Comm'n v. Brashear Freight Lines, Inc., 312 U.S. 621, 625 (1941).

8 Of course, the three-judge District Court has jurisdiction to decide all questions, local or federal, which may be

(continued on page 5)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 134 September Term, 1965
Civil Action No. 82-66

defendants, the three-judge court lacks authority to hear the latter claims.[9/] Further, because the latter claims are patently beyond the statutory jurisdiction of the three-judge court and because prompt trial of those issues is essential, see note 7 supra, it is not only unnecessary but also unwise to submit these issues to the three-judge court. As Chief Judge of the Circuit, I have the authority and duty under §2284 to refuse certification of these claims which cannot conceivably involve substantial constitutional attacks upon an Act of Congress and which are wholly extraneous to the issue properly before the three-judge court under count one.[10/]

The motion is denied.

Dated: May 31, 1966

3. considered in determining the constitutionality of the statute and the need for an injunction. Even where nonconstitutional grounds of attack on the statute are also alleged, a three-judge court is required to decide those issues as well. E.g., Florida Lime & Avocado Growers, Inc., v. Jacobsen, supra, note 3.

9. Cf., e.g., Public Serv. Comn's v. Brashear Freight Lines, Inc., supra note 7 at 525; Powell v. United States, 300 U.S. 276, 284-90 (1937); Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479, 488 (1930); Wright, Federal Courts 150, p. 165 (1963). See also Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., supra; California Water Serv. Co. v. City of Redding, supra note 2.

10. Since the three-judge panel so clearly lacked statutory authority to hear counts two through six, I do not decide whether, in cases where the claims are colorably within the statutory jurisdiction of the three-judge court, the determination of that court's jurisdiction should be made exclusively by the Chief Judge of the Circuit or should be left to the three-judge court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, et al

v.

CARL F. HANSEN, et al

CIVIL ACTION NO. 82-66
Causes of Action 2-6
(Single-judge Court)

MOTION FOR RESTRAINING ORDER AND INJUNCTIVE RELIEF

Plaintiffs hereby show the Court the following:

1. On May 18, 1966, Defendant School Board and Defendant members thereof, upon the recommendation of Defendant Hansen, approved by formal vote a study of the public school system of the District of Columbia to be conducted by Teachers College, Columbia University at an estimated cost of $250,000.00.

2. The matters involved in the proposed study are essentially the same issues involved in this action.

3. The study is scheduled to take approximately 18 months before issuance of a final report.

4. Plaintiffs are informed and believe that Professor A. Harry Passow, the director of the study, has stated that its purpose is to preempt and frustrate this action. Plaintiffs are informed and believe that such is the intention of the above-named Defendants.

5. The expenditure of such funds is designed to defend the present unconstitutional school system (as alleged in the Complaint and now before this single-judge Court for hearing and determination), and such expenditure therefore deprives Plaintiffs, their classes and their children of due process of law in violation of the Fifth Amendment to the Constitution. This study and the expenditure therefor will seriously impair the effectiveness of any future action that this Court might take.

6. The constitutional validity of the appointment of Defendant members of the School Board to their offices is now pending for decision before this Court as a three-judge Court. Unless enjoined, the aforesaid study will bind any future school board and impair the effectiveness of any judgment that might be issued by the three-judge Court.

7. The action of the above Defendants is in derogation of the valid order of this Court that required Defendants to participate in the selection and

financing of an expert to advise the Court as to Causes of Action 2 through 6 of the Complaint now before this Court in that a study of the identical issues in the Complaint has been contracted for with public funds to extend far beyond the projected time for the trial of this action and at a very large cost while Defendants have refused to participate in any way in the selection and financing of an expert to advise this Court in the pending action. Parenthetically, Defendants stated in oral argument, inter alia, that they lacked the funds necessary with which to finance the study ordered by the Court.

8. Plaintiffs have collected $1,000 to date for the payment of an expert to advise the Court and hereby offer this sum, as well as the future sums that are expected to come in for such purpose.

9. No previous application for the relief requested herein has been made to this or any other Court.

WHEREFORE, Plaintiffs request the Court to issue an order:

A. Declaring the study agreement invalid and enjoining the Defendants from taking any action, including the expenditure of public funds, under such agreement; or, in the alternative,

B. Enjoining the enforcement of such agreement until both Cause of Action No. 1, now before the three-judge Court, and Causes of Action 2 through 6, now before this Court, have been determined; and

C. Requiring Defendants to pay for the retaining of an expert or experts to advise this Court.

William M. Kunstler,
Attorney for Plaintiffs

May 24, 1966

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, et al,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 82-66
CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al,	:	
Defendants.	:	

OPPOSITION TO PLAINTIFFS' MOTION FOR RESTRAINING ORDER AND INJUNCTIVE RELIEF

The defendants, except the defendant judges, oppose plaintiffs' motion for a restraining order and injunctive relief filed herein on May 24, 1966. These defendants incorporate by reference and make a part hereof the affidavit of Dr. Carl F. Hansen which is attached hereto. The motion should be denied for the following reasons:

1. The motion contains allegations of fact which are unverified, not having been sworn to by any of the parties plaintiff. The motion is not supported by a memorandum of points and authorities as required by the rules of this Court.

2. The affidavit of Dr. Carl F. Hansen sets forth a denial under oath of the unverified factual allegations set forth and relied upon by plaintiffs in their motion and demonstrates that the school study in question was under development before this suit was filed.

3. The motion is an effort on the part of plaintiffs to circumscribe the jurisdiction of the three-judge court and was filed at a time when a three-judge court had for consideration the jurisdictional motions filed by these defendants. The motion, if considered at all, must be considered by the three-judge court.

4. As set forth in substantial detail by counsel for these defendants in their memorandum of February 23, 1966, counsel knows of no law which would require these defendants to contribute to the cost of a court expert, or which would permit a court to provide such an expert.

5. The proposed study by the Columbia Teachers College staff and the authorization therefor by the District of Columbia school administration is a valid exercise of an administrative function, the nature of which, cannot lawfully be enjoined by court action.

6. These defendants do not have funds available for the payment of a court expert even if such expert were permitted as a matter of law. The funds being utilized for the proposed Columbia Teachers College study of the District of Columbia school system are federal funds granted to the District of Columbia to be used "solely for educational purposes" or to "assist those agencies in the establishment and improvement of programs to identify and meet the educational needs" of the District of Columbia. See Conference Report No. 1916, "Statement of Managers on the Part of the House" to the National Defense Education Act Amendments, 1964, and Section 501, Title V, Elementary and Secondard Education Act of 1965. Neither this court nor these defendants have the authority to dictate as to the manner in which federal funds shall be expended. Larson v. Domestic and Foreign Corp., 337 U.S. 682; Malone v. Bowdoin, 369 U.S. 643.

Wherefore, these defendants respectfully request that the three-judge court deny plaintiffs' motion.

MILTON D. KORMAN
Acting Corporation Counsel, D.C.

JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

ROBERT R. REDMON
Assistant Corporation Counsel, D.C.

MATTHEW J. MULLANEY, JR.
Assistant Corporation Counsel, D.C.
Attorneys for all defendants except the Judges of the United States District Court for the District of Columbia.
District Building
Washington, D.C., 20004

CERTIFICATE OF SERVICE

I hereby certify that copy of Opposition to Plaintiffs' Motion for Restraining Order and Injunctive Relief was mailed, postage prepaid, to William M. Kunstler, Esq., Kunstler, Kunstler & Kinoy, Attorneys for Plaintiffs, 12 Tenth Street, N.E., Washington, D.C., and to Joseph M. Hannon, Esq., Assistant United States Attorney, Attorney for the Judges of the United StatesDistrict Court for the District of Columbia, United States Court House, Washington, D.C., this 27th day of May, 1966.

Assistant Corporation Counsel, D.C.
Attorney for all defendants except the Judges of the United States District Court for the District of Columbia.
District Building
Washington, D.C., 20004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, et al,	:	
Plaintiff,	:	
v.	:	
CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al,	:	Civil Action No. 82-66
Defendants.	:	

AFFIDAVIT OF DR. CARL F. HANSEN

I, Carl F. Hansen, being first duly sworn, on oath, depose and say:

I am Superintendent of Schools of the District of Columbia and have held that position since 1958. I am familiar with the circumstances that resulted in the approval by the Board of Education that the Columbia Teachers College make a study of the public school system of the District of Columbia. I have also read and am familiar with the allegations contained in Plaintiffs' "Motion for Restraining Order and Injunctive Relief" filed herein on May 24, 1966.

Upon information and belief, and upon personal knowledge, I state that on May 25, 1966, both I and Dr. Joseph Carroll, Assistant Superintendent, Department of General Research, Budget, and Legislation for the Public Schools of the District of Columbia, talked to Dr. Passow, in separate telephone conversations, concerning the instant motion and allegation numbered four contained therein, which was read in its entirety to Dr. Passow by Dr. Carroll. In each conversation Dr. Passow catagorically denied having made any statement such as is alleged in paragraph four, or that could be so construed.

The study to be undertaken by Columbia Teachers College was sought as an aid to the school administration in developing an exemplary school system. Such a study had not been undertaken in the District of Columbia since 1948, when the Strayer Study was performed. The scope of the study is as broad as the school system and will encompass all facets of public school education within the District of Columbia.

The inception of this study began on August 19, 1965. On that date, following a diologue with representatives of the "Committee of 100 Ministers", I agreed to recommend to the Board of Education that it authorize me to undertake arrangements with an outside agency for an objective review of the track system. At the same time, with the concurrence of the "Committee of 100 Ministers", I proposed to appoint a Citizens' Advisory Council to the Superintendent of Schools, that would consult with me in matters of District public education and particularly with respect to the proposed study. After consultation with leading citizens, the members of the Advisory Council were selected. (Exhibit A)

The Board of Education considered and approved the track study recommendation on September 22, 1965. The first formal meeting between me and the Citizens' Advisory Council was held on October 12, 1965. At these and subsequent meetings, we discussed the track study, possible outside groups to perform the study, and other important aspects of school operation and organization.

On January 10, 1966, Sterling Tucker, Chairman of the Citizens' Advisory Council, and I met with Dr. Passow to discuss the proposed study of the track system. We discussed the work of the Advisory Council and presented general information about the District of Columbia public schools, primarily for orientation purposes. After considerable discussion it became apparent to Dr. Passow, and he so recommended, that the goals of the school administration and the Advisory Council could not be achieved by a study of the track system alone. He recommended a comprehensive study of the entire public school system of the District of Columbia.

Dr. Passow, after exploratory conversations with his staff at the Teachers College, Columbia University, confirmed his recommendation of January 10, 1966, in a letter to me dated February 7, 1966,

and said that Teachers College would be able to undertake a comprehensive study. Copies of his proposal and a proposal from the University of Michigan were circulated to all members of the Advisory Council on February 11, 1966.

On February 28, 1966, the Advisory Council formally voted to recommend the selection of Columbia University to do the comprehensive study.

On March 16, 1966, I requested and received preliminary approval from the Board of Education for the proposed comprehensive study of the school system by Columbia University, with the understanding that details concerning the specific proposals and costs would be presented at a later Board Meeting.

On March 31, 1966, Dr. Passow met in open session with the Board of Education to consider the details of the study preliminary to the preparation of a formal proposal.

A detailed, formal proposal was submitted by Columbia Teachers College on May 9, 1966, and was forwarded by me to the Board of Education on May 12, 1966. Under that proposal, Columbia Teachers College agreed to undertake the study at a cost of $240,348. On May 18, 1966, the Board of Education approved the study and the plan of financing, which comprised the use of $216,500 of Federal Impact Aid funds and $25,000 from funds available under Title V, Elementary and Secondary Education Act of 1965.

Carl F. Hansen
CARL F. HANSEN
Superintendent of Schools
for the District of Columbia

Subscribed and sworn to before me this 27th day of May, 1966.

Eleanor J. McDuride
NOTARY PUBLIC, D. C.

My Commission expires: 8/31/69

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 1 1966
ROBERT M. STEARN
CLERK

Julius W. Hobson, et al.,

Plaintiffs,

v. Civil Action No. 82-66

Carl F. Hansen, Superintendent
of Schools of the District of Columbia, et al.,

Defendants.

ORDER

Upon consideration of the motion of all defendants, except the defendant judges, addressed to the three judge court to assume jurisdiction over the entire case and to stay further action pending disposition by the court of the constitutional questions raised in the complaint, the opposition thereto, and the oral arguments of counsel, and

It appearing that the order of the Chief Judge of the Circuit of March 29, 1966, designated the three judges therein named as members of the court to hear and determine only the first cause of action in the complaint, it is

ORDERED that the motion is denied.

Dated: May 31, 1966

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR., et al.,	
Plaintiffs	
v.	CIVIL ACTION NO. 82-66
CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al.,	
Defendants	

MOTION FOR SUMMARY JUDGEMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure Plaintiffs hereby move for summary judgement on the first cause of action in their complaint, since there is no triable issue as to any material fact and Plaintiffs are entitled to a judgement as a matter of law.

Kunstler, Kunstler and Kinoy
511 Fifth Ave.
New York, N.Y.
Attorneys for Plaintiffs

_____
William M. Kunstler
12 10th St., N.E.
Washington, D. C.

William L. Higgs
Of counsel

CERTIFICATE

I hereby certify that I have personally this day served a copy of this motion upon each of the attorneys for the Defendants in this case.

February _____, 1966.

_____
William M. Kunstler

NOTICE OF MOTION

To: Corporation Counsel
District of Columbia
Washington, D. C.

U. S. District Attorney

U. S. Court House

Washington, D. C.

Attorneys for Defendants

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room _____, United States Court House, Washington, D. C. on the _____ day of _____, 1966, at _____ o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: _____
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR., et al., Plaintiffs	
v.	CIVIL ACTION NO. 82-66
CARL F. HANSEN, Superintendent of Schools of the District of Columbia, et al., Defendants	

SUPPLEMENTAL BRIEF SUBMITTED ON BEHALF OF PLAINTIFFS

WILLIAM M. KUNSTLER
12 Tenth Street, N. E.
Washington, D. C.

Arthur Kinoy
511 Fifth Avenue
New York, New York

Of Counsel:
William L. Higgs
12 10th Street, N. E.
Washington, D. C.

I. PRELIMINARY STATEMENT

This Supplemental Brief is filed to supplement the points and authorities set forth in Plaintiffs' Brief of February 11, 1966.

On March 25, 1966 the Honorable J. Skelly Wright handed down an opinion in this case, referring the case to the Chief Judge of this Circuit, certifying to the necessity for the convening of a statutory three-judge District Court. On March 29, 1966 the Honorable David L. Bazelon, Chief Judge of the U. S. Court of Appeals for this Circuit, appointed this three-judge District Court to hear the issue raised by Plaintiffs as to the constitutionality of Sec. 31-101 of the D. C. Code and remanded the remaining causes of action to the single-judge District Court.

The three-judge District Court set argument for Monday, April 18, 1966, at 10 A. M.

The issue is framed procedurally in terms of Plaintiffs' Motion for Summary Judgment and the Defendants' Motion to Dismiss, both of which have been referred to this three-judge District Court. The issue presented is whether Sec. 31-101 of the D. C. Code, the statute directing the Judges of the U. S. District Court for the District of Columbia to select the District's Board of Education, is constitutional, as against Plaintiffs' attacks that (1) the statute is in clear violation of Article II, Section 2, Clause 2, of the Constitution, (2) the statute violates the Constitutional doctrine of Separation of Powers, and (3) the statute violates the fundamental of principles of Due Process.

Plaintiffs' original Brief contains the principal points and authorities on the first two points. This Supplemental Brief sets forth a somewhat fuller argument as to Point III. The final point in this Supplemental Brief deals with the question of remedy in the

event that this Court should find Sec. 31-101 of the D. C. Code to be in violation of the Constitution.

II. SUPPLEMENTAL POINTS AND AUTHORITIES

A. The Defendant Board of Education consists exclusively of non-judicial offices with solely executive responsibility, wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia

This point is admitted by Defendants. (Par. 7, p. 5 of Answer of Defendants other than the Federal District Judges).

B. Section 31-101 of the D. C. Code is unconstitutional in that it requires the Federal District Court for the District of Columbia to appoint members of a board with broad executive functions whose acts with respect to the constitutional rights of citizens come substantially and broadly within that Court's judicial powers under the Constitution.

Mr. Justice Cooley states:

> ...(A) legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government. (Cooley, Constitutional Limitations, 8th ed., p. 356.)

The case of Tumey v. Ohio, 273 U. S. 510 (1926), considered the question as to the reach of the Due Process Clause of the Fourteenth Amendment as applied to a factual situation in which the Mayor of a small Ohio town, and the town itself, were given by statute a percentage of the finances recovered in all cases of conviction in the Mayor's police court. Mr. Chief Justice Taft,

in holding the statute unconstitutional and in violation of the Fourteenth Amendment's Due Process Clause, stated (at p. 534):

> A situation in which an official per force occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. *

In delivering the opinion of the Court in In re Murchison, 349 U.S. 133 (1955), Mr. Justice Black considered the Michigan

* State's attorney put forth the argument to the Court that a state legislature has complete sweep in establishing its court system. The Chief Justice answered this argument (at pp.534, 535):

> Counsel for the State argue that it has been decided by this Court that the legislature of a State may provide such system of courts as it chooses; that there is nothing in the Fourteenth Amendment that requires a jury trial for any offender; that it may give such territorial jurisdiction to its courts as it sees fit; and therefore that there is nothing sinister or constitutionally invalid in giving to a village mayor the jurisdiction of a justice of peace to try misdemeanors committed anywhere in the county, even though the mayor presides over a village of 1,100 people and exercises jurisdiction over offenses committed in a county of 500,000. This is true and is established by the decisions of this Court in Missouri v. Lewis, 101 U.S. 22. 30; In re Claasen, 140 U.S. 200.. See also Carey v. State, 70 Ohio State 121. It is also correctly pointed out that it is compltely within the power of the legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the State and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a State may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy & Morgan, 16 Pet. 203. It may authorize the employment of detectives. But these principles do not at all effect the question of whether the State by the operation of the statutes we have considered has not vested the judicial power in one who by reason of his interest both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.

See also, in particular, Texas Electric Service Co. v. City, 54 F. 2d 97 (1931).

An instructive case following Tumey is Ex parte Baer, 20 F. 2d 912.

statute which authorized the Michigan judges to act as "one-man grand juries." The Michigan judge first sat as a one-man grand jury to hear evidence to bring the prosecution, and then, having done so, proceeded to try the case.

The Supreme Court held the statute in violation of the Due Process clause of the Fourteenth Amendment. Justice Black wrote (at pp. 135, 136):

> The question now before us is whether a contempt proceeding conducted in accordance with these standards complies with the due process requirement of an impartial tribunal where the same judge presiding at the contempt hearing had also served as the 'one-man grand jury' out of which the contempt charges arose....
>
> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as judge...not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio....Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U. S. 11, 99 L. ed. 11, 75 S. Ct. 11.

In speaking of the relationship of the Fourteenth Amendment's limitations on State action as compared to that of the Fifth Amendment on Federal action, Mr. Chief Justice Warren, referring to educational segregation in the District of Columbia, pointed out in Bolling v. Sharpe, 347 U. S. 497 (1954) (at p. 500):

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same constitution would impose a lesser duty on the Federal government.

C. The constitutional doctrine of separation of powers, as well as the related constitutional principle that non-judicial functions may not be imposed upon the Judiciary, are clearly violated by Sec. 31-101 of the D.C. Code.

In U.S. v. Carrollo, 30 F. Supp, (W.D. Mo., 1939), the Court had before it the question of constitutionality of a statute of Congress* placing upon the Federal District Courts the duty of certifying to the Secretary of Labor as to the advisability of deportation of certain persons. In a judicial proceeding filed in the District Court by Carrollo, the prospective deportee, the Federal District Court held that the statutory provision was clearly in violation of the separation of powers doctrine in that it placed upon the Court a non-judicial function of an executive nature calling for political judgment.

The case of United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, a case on direct appeal from a three judge District Court, sitting in this Court's jurisdiction, dealt with the constitutionality of a provision of the Hatch Act.

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*The statute, as set forth by the court follows (at p. 5):

> Section 155 of Title 8, U.S.C.A. provides as follows· Sec. 155 Deportation within certain times of aliens entering or found in the United States in violation of law. . .
>
> The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court or judge,thereof, sentencing such alien for such crime, shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this subchapter***

In considering the question of the rightness of the claims of several of the Plaintiffs, the Court stated (at p. 90):

> The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination.

In I.C.C. v. Brimson, 154 U.S. 447 1894, the Supreme Court upheld Sec. 12 of the Interstate Commerce Act, which authorized the Interstate Commerce Commission to seek judicial enforcement of its supoena duces tecum, as against an attach on the grounds that the statute assigned non-judicial functions to the Federal Courts in violation of the separation of powers doctrine, and was hence unconstitutional. The Supreme Court, after reviewing its cases considering the question of non-judicial functions and separation of powers, stated (at p. 483):

> The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the statutory doctrine that Congress (excluding the special cases provided for in the Cosntitution, as, for instance, in section two of article two of that instrument)* may not impose upon the courts of the United States any duties not strictly judicial.**

*This example used by the Court probably is in reference to the appointment power provision at issue in this case. It is interesting that the Opinion is by the former Mr. Justice Harlan and, as the present Justice Harlan's comment in footnote 54 of the Zdanok case (370 U.S. 530) the meaning is not very clear and obiter.

** Mr. Justice Harlan, for the Court, continues (at p. 485):

> The duties assigned to the Circuit Courts of the United States by the twelfth section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . (p.487). One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendents are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's case, will be a 'final and indisputable basis of action', as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect

It is not altogether irrelevant to note that the Congress that enacted the statute voided in Muskrat* was the same 59th Congress that passed the 1906 statute that is at issue in this case.

In two Supreme Court cases, Prentis v. Atlantic Coastline Company, 211 U.S. 210, and Dreyer v. Illinois, 187 U.S. 71, there is found exceedingly broad language concerning the power of the State to inter-mix the executive, legislative, and judicial functions. It should be pointed out that in Prentis the issue was whether or not the rate orders of the Virginia Railroad Commission were such as to protect the orders from being enjoined by the Federal Anti-State Court Injunctions Act; the Court held that such proceedings were not "judicial" for the purposes of that Act. In Dreyer the Supreme Court held that the Illinois statute vesting in the Illinois State Parole Board certain pardon and parole powers normally belonging to the chief executive did not violate the Fourteenth Amendment.

The facts in these cases seem to contrast quite strongly with those in Tumey, Murchison, and the case at bar.**

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by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed on it by the Congress in executive of a power granted by the Constitution.

*Muskrat v. United States, 219 U.S. 346 (1911)

**Though perhaps the point has already been indirectly made in the Plaintiff's Brief, it would seem that the appointment power phrase in Article 2, Section 2, Clause 2, of the Constitution should not be so construed as to produce violations of both the Due rocess clause of the Fifth Amendment and the Constitutional doctrine of Separation of Powers, as expressed in an independent judiciary, as well as the entire spirit underlying the Constitution.

See also Commissioner of Internal Revenue v. Liberty Bank and Trust Company, 59 F. 2d 320, 323.

D. If this Court should hold that Sec. 31-101 of the D.C. Code is not a valid enactment, then the appropriate and proper relief is to order the Defendant Board of Elections of the District of Columbia to conduct an at large election for the School Board of the District of Columbia.

> Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these day, it is doubtful that any child may reasonably be expected to suceeed in life if he is denied the opportunity of an education.

These were the words of Mr. Chief Justice Warren in Brown v. Board of Education, 347 U.S. 483 (1954). It is clear, then, that the issue presented by this case involves matters of great and urgent concern to all citizens of the District of Columbia.

Prior to 1874 the School Board seems to have been primarily elected and, where some of the members were appointed, their appointment was by an elected District government.*

In 1874 Congress placed the District under the government of a Presidentially-appointed Board of Commissioners. The Commissioners appointed the School Board until the 1906 Act stripped them of this power and placed it in the then Supreme Court of the District of Columbia, now the United State District Court for the District of Columbia. The present provision for appointment of school board members was proposed by Congressman

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* See legislative history of Sec. 31-101 of the D.C. Code 40 Cong. Rec. 5754-5764 (1906), as well as the various organic acts of the District of Columbia set forth in the preliminary pages of the first volume of the D.C. Code.

Foster of Vermont as an amendment to be added onto a bill recommending an increase in D.C. teacher salaries.* Foster stated his reason clearly for the amendment: "My signle object is to have a change in the board, to have a change for the better in the board, to improve the board, to make it a board with sufficient capacity and practical business ability to conduct the schools of Washington in a proper manner."** (emphasis added). A number of times Foster explained the need for the change:

> But I am bound to say. . . that the school board as an official entity has made during its existence a record for incapacity, for inability, for weakness, for indifference, that would be hard to be equaled in any other community in our country. . .***
>
> It is my humble opinion that this condition of things is due to the fact that the members of the board of education are appointe by, and are under the supervision of, this little body of 'peanut politicians' to whom my friend (another Congressman) refers as District Commissioners.****
>
> My single purpose in this amendment is to provide for an absolute divorce of the school system from the rest of the municipal government. I believe that this is absolutely essential in order to secure the best results. I have no pride of opinion as to the selection of the appointing power. Only take the appointing power from the District Commissioners, and an improvement over present conditions will be assured.*****
> (emphasis added).

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* 40 Cong. Rec. p. 5755 (1906)

** Ibid. p. 5756, col 2, par. 2

***Ibid. p. 5755, col 2, par 2 repeated: p. 5756, col. 2, par 8.

**** Ibid. p. 5756, col 2, par. 8

***** Ibid. p. 5759, col 2, par 3. Such demand for a divorce is repeated in answer to a question, p. 5759, col 2, par 11. Other Congressmen also indicated they wanted this. See Grosvenor's statements, p. 5758, col 2, par. 8

The most surprising part of the debate is that Foster several times stated that what he really wanted was that the people of D.C. would elect their own school board:

> In nearly every community the very best method for the selection of the members of the school board prevails--the method of election by the sovereign people. Where that method prevails the board is responsible directly to the taxpayers and board, patriotic citizens are chosen to serve upon the board, and they are glad to give their services as a matter of patriotism for the benefit of the boys and girls of their respective communities. And this is the method that I am finally in favor of here. I think that we must in the end return to that system in the District of Columbia.*

This idea was echoed by other Congressmen. Clark from Missouri said:

> We have pending here now four distinct propositions as to how these school trustees shall be elected or appointed. The committee recommends that the Commissioners of the District of Columbia appoint them. The gentleman from Vermont (Mr. Foster) recommends that the supreme court of the District of Columbia appoint them. The gentleman from Illinois (Mr. Madden) wants the President of the United States to appoint them. Somebody suggested, although the proposition has not been put into concrete form, that the people of the District of Columbia elect the trustees; and, gentlemen, when you get down to the bottom of facts about it, that is the only one of these propositions that has any common sense in it. (applause) **

Clark continued:

> If I had my way about it, I would put the people of the District on a flat-footed equality, so far as home rule is concerned, with the rest of the communities of the United States, and they should work out their own salvation with fear and trembling. . . Give them back the right to vote; compel them to levey and collect their own taxes and to disburse their own revenues.***

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*Ibid. p. 5758, col 2, par 13.

** Ibid. p. 5761, col 2, par. 2

*** Ibid, p. 5761, col 2, par. 4

The answer to the question as to why didn't Congress provide for election seems to be that there was pending a bill to provide the District with a city charter.*

Instead of waiting until such a charter came before the House, Foster wanted to do something at that moment and was willing to accept giving the appointment power to the judges and taking it out of the hands of the Commissioners:

> ...For the present, it seems to me we are taking a step in the right direction.**

Clark also said he would accept this:

> To have the judges of the supreme court of the District appoint the trustees is the proposition which strikes me most favorably of these three, for I can not get the trustees elected, as they ought to be.***

It seems clear, then that the 1906 Congress intended to repeal the earlier laws dealing with the election of the school board and to replace them with the temporary arrangement of appointment by the Federal District Judges until election machinery could be set up to enable the people to choose the board. At present, of course, as testified to by the presence of the Defendant Board of Election Commissioners in this case, there now exists machinery to conduct at large elections for the School Board in the District of Columbia.

James Madison, in his speech in the House proposing and outlining the proposed Bill of Rights to the Constitution, stated:

> "The Amendments which have occurred to me proper to be recommended by Congress to the State legislatures are these: First. That there be prefixed to the Constitution a declaration, that all power is originally vested in and consequently derived from the people.
>
> That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

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*Ibid, p. 5758, col. 2, p. 13

** Ibid, p. 5758, col. 2, par. 13

***Ibid, p. 5762, col. 1, par. 3

[illegible]

[illegible]

[illegible]

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*Ibid. [illegible] 21, 1, 1, 1

> That the people have an indubitable, inalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.*

Madison's proposals were finally embodied in the Ninth and Tenth Amendments.**

The continuing vitality of the Ninth Amendment has been vividly attested by the Supreme Court's opinion on Griswold v. Connecticut, _____ U. S. _____, 85 S. Ct. 1678 (1965),*** which invalidated the Connecticut contraceptive statute.

A number of state cases explicitly recognize the residual right of the people to elect their officials as a guiding principle. As the Montana Court said in State v. Lentz, 146 P. 932, 936:

> ...(T) he general policy of our government, as indicated by these provisions, is that election to office by the people, when it may be conveniently done, is the general rule, and that appointments to fill vacancies made to meet the requirements of public business shall be effective only until the people may act.****

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* Volume I, Debates and Proceedings in the Congress of the U. S. (Joseph Gales, Sr., Ed.: Wash. 1934) pp.433, 434 (June 8, 1789).

** AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

*** See particularly the Opinion of Mr. Justice Goldberg (at page 1682), in which the Chief Justice and Mr. Justice Brennan join. See also the multi-relevant case of White v. Barker, 160 Iowa 96, 89 N. W. 204 (1902).

**** See also State v. Sims, 90 S. E. 2d 288 (W. Va.) at p. 291; White v. Barker, supra, (Iowa); Buchholtz v. Hill, 13 A. 2d 348 (Md.) 1940 at p. 350; Marion County Election Board v. O'Brien, 169 N. E. 2d 287 (Indiana), at p. 293; Riley v. Cordell, 194 P. 2d 857 (Okla.) at p. 890; and 67 C.J.S. "officers", Sec. 27, p. 156.

[illegible]

*

Article I [illegible] in the Constitution of the U. S.
(Joseph Gelpin [illegible] Bd) [illegible] (June 9, 1981).

**

[illegible]
[illegible] of constant right [illegible]
[illegible] gown of graduate school [illegible]
[illegible]

***

[illegible]
[illegible] the States are reserved to the States
[illegible] people.

See Presidential vice objection of Mr. Justice Douglas (at page 1283)
in which the Chief Justice and Mr. Justice Brennan join. See also
the [illegible]-retaining case of [illegible] v. Harper, 150 Iowa 36 [illegible]
SON (1909).

****

See also [illegible] v. [illegible], [illegible] (Ga.): [illegible] v. Hill, 13 N. Y. Sup 348 (Mg.)
[illegible] 55 P. [illegible] v. O'Brien, 251 N. E.
[illegible] 588 (Ind.); [illegible] v. [illegible], 254 P. 54 888 (Okla.)
[illegible] 1 Ill. 2d 1, 108 Ind 62 [illegible], 22 P. 126.

[illegible] v. Bankof, [illegible] (Ga.): [illegible] v. Hill, 13 N. Y. Sup 348 (Mg.)
[illegible] 55 P. [illegible] v. Brien, 251 N. E.
[illegible] 588 (Ind.); [illegible] v. [illegible], 254 P. 54 888 (Okla.)
[illegible] 1 Ill. 2d 1, 108 Ind 62 [illegible], 22 P. 126.

In the United States the people of the District of Columbia are uniquely subject to an undemocratic government. Any claim that any of the agencies governing them has more than an ephemeral connection with the expressed will of the District's citizens is totally unfounded. None of their officials in whom appointive power might be vested is subject to the electorate. The most that can be said is that they have some small voice in the election of the President, but even this suffrage is far from proportionate to their numbers if the District were a State. The recent apportionment decisions of the Supreme Court have assured every citizen of every State in the Union that their connections to their government -- state, local or national -- will never be even remotely as tenuous and slight as those of the citizens of the District. Therefore, it would seem that the fundamental principle of American jurisprudence favoring election by the people should apply with uniquely intense force in the District of Columbia.

III. CONCLUSIONS

Plaintiffs respectfully submit that the clause of the 1906 Act conferring the duty upon the Federal District Judges of the District of Columbia to appoint the members of the School Board is in violation of the Constitution and, therefore, void, and that immediate at large elections by the people of the District of Columbia should be held to fill the nine positions on the District School Board.

Respectfully submitted,

William M. Kunstler

William L. Higgs,
Cf Counsel

CERTIFICATE

I, William M. Kunstler, hereby certify that I have this day served a copy of this brief on attorneys for Defendants.

April 18, 1966

William M. Kunstler

I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Return To Ark.

JULIUS W. HOBSON, individually and on behalf of JEAN MARIE HOBSON and JULIUS W. HOBSON, JR.; all residing at 4801 Queens Chapel Terrace N.E. D.C.; SAMUEL D. GRAHAM, individually and on behalf of BARBARA JEANE GRAHAM and KAREN CHANDELLE GRAHAM; all residing at 1827 Massachusetts Ave. S.E. D.C.; MARY ALICE BROWN, individually and on behalf of CHARLES HUDSON BROWN; both residing at 2412 20th St. D.C. ; PAULINE SMITH, individually and on behalf of MAURICE HOOD; both residing at 1017 4th St. S.E. D.C.; WILLIE DAVIS, JR., individually and on behalf of RONALD D. DAVIS, REGINALD D. DAVIS and MYOSHI J. DAVIS; all residing at 3931 14th St. N.W., D.C.; JAMES K. WARD, individually and on behalf of CHRYCYNTHIA ELAIN WARD; both residing at 1100 Trenton Pl. S.E. D.C.; JOYCE M. MAKEL, individually and on behalf of MICHELLE I. MAKEL; and CAROLYN HILL STEWART, residing at 1303 Congress St. S.E. D.C.

CIVIL ACTION
No. 82-66

13

Moving to Prince George's

Eric Hook

Plaintiffs,

- against-

CARL F. HANSEN, Superintendent of Schools of the District of Columbia; THE BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA; WESLEY S. WILLIAMS, President of the Board of Education of the District of Columbia; CARL SMUCK, EVERETT A. HEWLETT, WEST A. HAMILTON, LOUISE S. STEELE, EUPHEMIA L. HAYNES, GLORIA K. ROBERTS, PRESTON A. McLENDON, and IRVING B. YOCHELSON, members of the Board of Education of the District of Columbia; CHIEF JUDGE MATTHEW F. McGUIRE; SENIOR JUDGES JOSEPH L. JACKSON, HENRY A. SCHWEINHAUT, CHARLES S. McLAUGHLIN and DAVID A. PINE; and DISTRICT JUDGES ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, BURNITA SHELTON MATTHEWS, LUTHER W. YOUNGDAHL, JOSEPH C. McGARRAGHY, JOHN J. SIRICA, GEORGE L. HART, JR., LEONARD P. WALSH, WILLIAM B. JONES, SPOTTSWOOD W. ROBINSON, III, HOWARD S. CORCORAN, OLIVER GASCH, WILLIAM B. BRYANT, all of the United States District Court for the District of Columbia; THE BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA; CHARLES H. MAYER, (Chairman), ERNEST SCHEIN and DR. ROBERT EARL MARTIN, members of the Board of Elections of the District of Columbia,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

C O M P L A I N T

The plaintiffs, for their verified complaint, allege:

Parties

1. Plaintiffs:

(a) The infant plaintiffs, JULIUS W. HOBSON, JR., (McKinley High School); BARBARA JEANE GRAHAM, (Eastern High School); KAREN CHANDELLE GRAHAM, (Hines Jr. High School); CHARLES HUDSON BROWN, (Langdon Elementary School); MAURICE HOOD, (Randall Jr. High School); RONALD D. DAVIS, (Crosby Noyes Elementary School); REGINALD D. DAVIS, (Crosby Noyes Elementary School); MYOSHI J. DAVIS, (Crosby Noyes Elementary School); CHRYCENTHIA ELAIN WARD, (Congress Heights Elementary School), and MITCHELL I. MAKEL, (Crosby Noyes Elementary School) are among those generally classified as Negroes; are citizens of the United States and of the District of Columbia. They are within the statutory age limits of eligibility to attend the public schools of the District of Columbia. They satisfy all of the requirements for admission to such schools and are, in fact, attending public schools under the supervision, operation and control of the defendants. These plaintiffs comprise two general categories, viz., those who are eligible to attend and are attending public elementary schools and those who are eligible to attend and are attending public secondary schools in the District of Columbia, both types of schools being under the direct supervision, operation and control of the defendants. Some plaintiffs have been placed and are presently placed in the "basic" and "general" tracks of the so-called "track system" presently in operation in the public schools of the District of Columbia, as more fully explained in the paragraph of this complaint numbered and designated "13".

(b) Adult plaintiffs, JULIUS W. HOBSON, SAMUEL D. GRAHAM, MARY ALICE BROWN, PAULINE SMITH, WILLIE DAVIS, JR., JAMES K. WARD and JOYCE M. MAKEL are among those classified as Negroes; are citizens of

the United States and of the District of Columbia and are residents of and domiciled in the District of Columbia. They are taxpayers of the District of Columbia and of the United States. They are guardians and parents of the infant plaintiffs referred to in the paragraph above and designated in the caption of this action, and are required by the laws of the District of Columbia to send the children under their charge and control to public or private schools. In addition, plaintiff JULIUS W. HOBSON has been compelled, for some or all of the reasons hereinafter set forth, to remove his infant daughter, JEAN MARIE HOBSON, from the Amidon Elementary School, a public school under the supervision and control of the defendants, and enroll her, at great cost and inconvenience, in a private school.

(c) Plaintiff CAROLYN HILL STEWART is among those classified as Negroes; is a citizen of the United States and of the District of Columbia and is a resident of and domiciled in the District of Columbia. She is a permanent teacher in the public school system of the District of Columbia and is required by the terms of her employment to obey, adhere and conform to defendants' rules, regulations, policies, directives, customs, practices and usages.

2. Plaintiffs bring this action in their own behalf and in behalf of all other Negro children attending the public schools in the District of Columbia, their parents and guardians, and teachers employed by the defendants similarly situated and affected with reference to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being common questions of law and fact, a common relief being sought, as will hereinafter more fully appear, plaintiffs present this action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

3. <u>Defendants</u>:

(a) Defendant BOARD OF EDUCATION exists pursuant to the laws of the United States governing the District of Columbia. (Code of the District of Columbia, §31-101) Defendant WESLEY S. WILLIAMS,

(Negro) is President of the said BOARD OF EDUCATION; defendants CARL SMUCK (white), EVERETT A. HEWLETT (Negro), WEST A. HAMILTON (Negro), LOUISE S. STEELE (white), EUPHEMIA L. HAYNES (Negro), GLORIA K. ROBERTS (white), PRESTON A. McLENDON (white), and IRVING B. YOCHELSON (white), are members of the said BOARD OF EDUCATION and all are being sued in their official capacities.

(b). Defendant, CARL F. HANSEN, is the Superintendent of Schools of the District of Columbia (hereinafter referred to as the Superintendent of Schools). He is the executive officer of the Board of Education, charged with the responsibility of maintaining, managing and governing the public schools in the aforesaid District, in accordance with the rules, regulations, policies, directives, customs, practices and usages established by defendant BOARD OF EDUCATION. He is being sued in his official capacity.

(c) The defendant, HON. MATTHEW F. McGUIRE, is the Chief Judge of the United States District Court for the District of Columbia; the defendants HONS. JOSEPH L. JACKSON, HENRY A. SCHWEINHAUT, CHARLES S. McLAUGHLIN and DAVID A. PINE, are Senior Judges of the United States District Court for the District of Columbia; defendants, the HONS. ALEXANDER HOLTZOFF, RICHMOND B. KEECH, EDWARD M. CURRAN, BURNITA SHELTON MATTHEWS, LUTHER W. YOUNGDAHL, JOSEPH C. McGARRAGHY, JOHN J. SIRICA, GEORGE L. HART, JR., LEONARD P. WALSH, WILLIAM B. JONES, SPOTTSWOOD W. ROBINSON, III, HOWARD S. CORCORAN, OLIVER GASCH, and WILLIAM B. BRYANT are District Judges of the United States District Court for the District of Columbia. All are being sued in their official capacities.

(Any reference to defendants hereinafter contained in this complaint shall not pertain to any of the United States District Court judges heretofore mentioned unless they are specifically mentioned by name or designation.)

(d) Defendants, CHARLES H. MAYER, (Chairman), ERNEST SCHEIN and DR. ROBERT EARL MARTIN, are members of the Board of Elections of the District of Columbia and are sued in their official capacities. Said Board of Elections has the responsibility for scheduling, holding and/or conducting all elections within the District of Columbia. (Any reference

to defendants hereinafter contained in this complaint shall not pertain to any of the members of the Board of Elections of the District of Columbia heretofore mentioned unless they are specifically mentioned by name or designation.)

JURISDICTION

4. (a) The jurisdiction of this Court is invoked under Title 28 U.S.C., §1331. This action arises under the Fifth Amendment to the Constitution of the United States, and Article II, §2, Clause 2 of the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Ten Thousand ($10,000.00) Dollars.

(b) The jurisdiction of this Court is also invoked under Title 28 U.S.C. §1343. This action is authorized by Title 42 U.S.C., §§1981 et seq., §§ 2000(c) et seq., and §§2000(d) et seq.; and the Elementary and Secondary Education Act of 1965.

(c) The jurisdiction of this Court is further invoked under Title 28 U.S.C. §2282. This is an action for a permanent injunction restraining, inter alia, the enforcement, operation and execution of §31-101 of the District of Columbia Code and of the rules, regulations, policies, directives, customs, practices and usages of the Board of Education of the District of Columbia as more fully set forth below.

5. This is a proceeding for declaratory judgment under Title 28 U.S.C., §2201 for the purpose of determining questions of actual controversies between the parties, to wit:

(a) The question of whether §31-101 of the District of Columbia Code which directs the District Judges of the United States District Court forthe District of Columbia to appoint the members of the Board of Education of the District of Columbia (hereinafter referred to as the Board of Education) violates Article II, §2, Clause 2 of the Constitution of the United States in that it purports to and does in fact delegate unconstitutional powers to the District Judges of the United States District Court for the District of Columbia.

(b) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them, in denying, on account of race and color, the infant plaintiffs and other Negro children of public school age residing in the District of Columbia, educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated in the District of Columbia, are unconstitutional and void, as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

(c) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants, and each of them in denying on account of race and color the adult plaintiffs, with the exception of plaintiff CAROLYN HILL STEWART, and other parents and guardians of Negro children of public school age similarly situated residing in the District of Columbia, rights and privileges of sending their children to public schools in said District with educational opportunities, advantages and facilities, including those hereinafter specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age in the District of Columbia, are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

(d) The question of whether the enforced participation of plaintiff CAROLYN HILL STEWART and other Negro teachers employed by the Board of Education of the District of Columbia in the implementation of rules, regulations, policies, directives, customs, practices and usages of defendants and each of them, which deny, on account of race and color, to the infant plaintiffs and other Negro children residing in said District educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities,

advantages and facilities afforded and available to white children of public school age similarly situated, deprives said plaintiffs of due process and the equal protection of the law, in contravention of the Fifth Amendment to the Constitution of the United States.

(e) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them in intentionally denying, on account of race and color, the infant plaintiffs and other Negro children of public school age residing in the District of Columbia educational opportunities, advantages and facilities in the public elementary and secondary schools of said District, including those hereinabove specified, equal to the educational opportunities, advantages and facilities afforded and available to white children of public school age similarly situated in adjoining, adjacent and contiguous areas of Maryland and Virginia are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law, in contravention of the Fifth Amendment to the Constitution of the United States.

(f) The question of whether the rules, regulations, policies, directives, customs, practices and usages of the defendants and each of them in intentionally denying, on account of race and color, the adult plaintiffs, with the exception of CAROLYN HILL STEWART, and other parents and guardians of Negro children of public school age similarly situated residing in the District of Columbia, rights and privileges of sending their children to public schools in their District with educational opportunities, advantages and facilities, including those hereinafter specified, equal to the educational opportunities, advantages and facilities offered and available to white children of public school age in adjoining, adjacent and contiguous areas of Maryland and Virginia, are unconstitutional and void as depriving said plaintiffs of due process and the equal protection of the law in contravention of the Fifth Amendment to the Constitution of the United States.

CAUSES OF ACTION

First Cause of Action:

6. Pursuant to §31-101 of the District of Columbia Code, the District Judges of the United States District Court for the District of Columbia are directed and empowered to nominate and appoint nine (9) members of the defendant BOARD OF EDUCATION, as follows: three members thereof to be nominated and appointed per annum for terms of three (3) years.

7. Said defendant BOARD OF EDUCATION consists exclusively of non-judicial officers with solely executive responsibilities wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia.

8. The vesting of the power of nomination and appointment of non-judicial officers with executive responsibilities wholly unrelated to the functions and responsibilities of the United States District Court for the District of Columbia is prohibited by Article II,§2, Clause 2 of the Constitution of the United States.

9. Said defendant BOARD and the members thereof have, therefore, been unconstitutionally nominated and appointed and are now unconstitutionally functioning and operating as the Board of Education of the District of Columbia.

10. Defendant HANSEN having been nominated and appointed by defendant BOARD OF EDUCATION and the members thereof has been and is now unconstitutionally functioning and operating as the Superintendent of Schools.

Second Cause of Action:

11. The establishment, maintenance and administration of public schools in the District of Columbia are vested in the Board and the Superintendent of Education of the District of Columbia.

12. The public schools of the District of Columbia are under the direct control and supervision of defendants who are under a duty to maintain an efficient system of public schools in said District, wholly consistent with the requirements of the Constitution of the United

States. Said District has a public school population that is almost ninety percent Negro and ten percent white, and a total population that is sixty-one percent Negro and thirty-nine percent white.

13. The defendants, and each of them, have at all times operated and, unless restrained as a result of this action, will continue to operate the public school system of the District of Columbia in such a manner as to discriminate against the infant plaintiffs solely because of their race and/or color, all in violation of the Fifth Amendment to the Constitution of the United States. Among other things, defendants:

(a) have originated and continue to administer since the decision of the United States Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954), in the public schools under their supervision, a rigid system of pupil ability grouping, referred to hereinafter as the "track system". This system consists of at least four (4) tracks -- basic, general, regular and honors -- and the placement of a public school student in any one thereof is normally decisive during the balance of his or her public school attendance. The intent and/or effect of the application of said "track system" has been the separation, segregation and exclusion of the infant plaintiffs and their classes, as well as the denial thereto of an education equal to that offered all qualified students who are not of Negro descent.

Moreover, the further intent and/or effect of defendants' application of the "track system" is to deprive the infant plaintiffs and their classes of further educational opportunity by the discriminatory utilization of the non-college preparatory "general" and "basic" tracks insofar as Negro pupils are concerned. At the same time, the college preparatory "regular" and "honor" tracks are discriminatorily utilized by the defendants to allow students who are not of Negro descent to qualify for college and to separate them from the bulk of students of Negro descent.

Moreover, the further intent and/or effect of the "track system" is to discourage and prevent the infant plaintiffs and their classes from even completing their secondary education.

(b) have pursued and continue to pursue educational policies and practices based upon race and color that foster and encourage the juvenile delinquency of the infant plaintiffs and their classes.

(c) have provided and continue to provide for those schools under their supervision with predominantly white pupil populations plant, equipment, materials, supplies and curricula discriminatorily superior to those provided for schools with predominantly Negro pupil populations, thereby depriving the infant plaintiffs and their classes, solely because of race and color, the opportunity of attending public schools where they can obtain an education equal to that offered to all qualified students who are not of Negro descent.

(d) have utilized and continue to utilize public revenues under their control to match or equal private funds raised in predominantly white residential areas of the District for the purpose of improving the plant, equipment, materials, supplies and curricula in the public schools of said areas, thereby discriminating against public schools attended by the infant plaintiffs and their classes.

(e) have accepted and continue to accept private funds for use in the improvement of plant, equipment, material, supplies and curricula in designated public schools with predominantly white pupil populations, thereby depriving the infant plaintiffs and their classes, solely because of race and color, the opportunity of attending public schools where they can obtain an education equal to that offered to all qualified students who are not of Negro descent.

(f) have stationed and continue to station police and other law enforcement officials conspicuously in and about schools attended by the infant plaintiffs and their classes, thereby causing the intimidation and degradation of said Negro students solely because of their race and color.

(g) have dismissed from and/or refused to appoint and continue to dismiss and/or refuse to appoint to high administrative and policy making positions in the District school system qualified Negroes solely on account of their race and color.

(h) have failed, neglected and refused and continue to fail, neglect and refuse to promote plaintiff CAROLYN HILL STEWART and other Negro teachers similarly situated to positions for which they are highly qualified, solely because of their race and color.

(i) have failed to utilize and continue to fail to utilize funds provided by the Elementary and Secondary Education Act of 1965 to further the education of those infant plaintiffs and their classes who are members of families earning Three Thousand ($3000.00) Dollars or less per annum, and have, instead, discriminated and continue to discriminate in the distribution of said funds in favor of those schools under their supervision with predominantly white pupil populations.

(j) have allocated and assigned and continue to allocate and assign less experienced and/or "temporary" teachers to those schools attended by the infant plaintiffs and their classes, while at the same time they have allocated and assigned and continue to allocate and assign more experienced and "permanent" teachers to those schools with predominantly white pupil populations.

(k) have drawn and continue to draw the geographical lines or limits of the various sections of the District of Columbia under their jurisdiction so as to separate, segregate and exclude the infant plaintiffs and their classes from those schools with heretofore predominantly white school populations so as to maintain the racial composition thereof.

(l) have ignored and violated and continue to ignore and violate the mandate of the Supreme Court of the United States in Bolling v. Sharpe, supra, in which the Court held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." (at 500)

Third Cause of Action:

14. Defendants have failed, refused and neglected and continue to fail, refuse and neglect to demand adequate funds from the agencies of the District of Columbia and the Congress of the United

States with which to operate the public school system under their control. Such refusal, neglect and failure, together with defendants' improper actions as hereinbefore alleged have directly resulted in the decline of the quality of the plant, equipment, materials, supplies and curricula of the public school system of the District of Columbia, thereby purposely and wilfully creating racial discrimination and segregation in the public schools of the District of Columbia in relation and diametric contrast to those in adjoining, adjacent and contiguous sections of Virginia and Maryland. As a result, the infant plaintiffs and their classes have suffered and are continuing to suffer from said failure, neglect and refusal of defendants to demand adequate funds for the operation of the District school system, and their other improper actions as hereinbefore alleged, all in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Fourth, Fifth and Sixth Causes of Action:

15. All of the allegations hereinbefore set forth based on race and/or color are hereby repeated and realleged based upon economic deprivation and poverty with the same force and effect as if more fully and completely here set forth.

16. Plaintiffs and others similarly situated are suffering irreparable injury and are threatened by irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this suit for declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated could be entitled would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience not only to the plaintiffs and those similarly situated, but to defendants, as well.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

1. The Court, upon filing of this complaint, notify the Chief Judge of this Circuit as required by 28 U.S.C., §2284, so that the Chief Judge may designate two other judges to serve as members of a three-judge court as required by Title 28, U.S.C., §2282, to hear and determine this action.

2. The Court enter a judgment or decree declaring that §31-101 of the District of Columbia Code is unconstitutional insofar as it purports to direct or does direct the nomination and appointment of the Members of the Board of Education of the District of Columbia by the District Judges of the United States District Court for the District of Columbia.

3. The Court issue a permanent injunction forever restraining the judicial defendants from executing, enforcing or administering so much of §31-101 of the District of Columbia Code as empowers them to nominate and appoint members of the defendant Board of Education.

4. The Court enter a judgment and decree declaring that the defendant members of the Board of Education and the defendant Superintendent of Schools purporting to hold office in the District of Columbia have been illegally nominated and appointed thereto and declaring vacant each of said offices and nominating and appointing interim trustees or receivers to administer the District school system until certification of the results of at-large elections as hereinafter set forth, and subject to such directives as this Court may issue.

5. The Court enter a judgment or decree ordering and directing the Board of Elections of the District of Columbia promptly to schedule, hold and conduct at-large elections for the nine vacant positions of members of the Board of Education with the duration and sequence of their said terms in conformity with the present duration and sequence thereof.

6. The Court issue a permanent injunction forever restraining and enjoining the defendants Board of Education and Superintendent of Schools and each of them from:

(a) any further utilization of the "track system" or any other ability grouping or other test or device that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(b) any further utilization of plant, equipment, materials, supplies and curricula that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(c) any delineation or demarcation of school zone lines that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(d) any further matching or equaling of public revenues under the control and supervision of defendants with private funds that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(e) any further acceptance of private funds that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(f) any further stationing of law enforcement officers in or about any school under the control and supervision of defendants that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(g) any further utilization of funds provided by the Elementary and Secondary School Act of 1965 that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(h) any further pursuance of educational policies and practices based upon race and color that foster or encourage juvenile delinquency among the infant and their classes.

(i) any further disproportionate assignment of teacher personnel that is intended to or does in fact discriminate on the basis of race and color as between the pupils under the control and supervision of defendants;

(j) any further dismissal of or refusal to appoint qualified Negro citizens to high administrative and/or policy-making positions in the district school system that is intended to or does in fact discriminate on the basis of race and color;

(k) any further refusal, neglect or failure to promote qualified Negro teachers that is intended to or does in fact discriminate on the basis of race and color;

(l) any further refusal, neglect or failure to demand of the Commissioners of the District of Columbia and the Congress those funds necessary to provide the infant plaintiffs and their classes with the quantity and quality of education equal to that provided to white children in the public schools of adjoining, adjacent and contiguous areas of Maryland and Virginia.

7. Plaintiffs further pray that the Court will allow them their costs herein and such further, other or additional relief as may appear to the Court to be equitable and just.

8. Plaintiffs further pray that the Court retain jurisdiction of this cause after judgment, to render such relief as may become necessary in the future.

WILLIAM M. KUNSTLER
12 Tenth Street, N.E.
Washington, D.C.

KUNSTLER KUNSTLER & KINOY
511 Fifth Avenue
New York, New York 10017

Arthur Kinoy
William M. Kunstler

Attorneys for Plaintiffs

By William M. Kunstler
William M. Kunstler

Of Counsel:

William L. Higgs

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss.:

JULIUS W. HOBSON, being duly sworn deposes and says that he is one of the plaintiffs in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JULIUS W. HOBSON

Sworn to before me
this 13th day of January, 1966

NOTARY PUBLIC

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,388 | September Term, 1966

Julius W. Hobson, et al., | Civil Action 1071-66

Petitioners,

v.

The Honorable Oliver Gasch,
District Judge of the United States
District Court for the District of
Columbia,

Respondent.

United States Court
of Appeals for the
District of Columbia
Circuit
FILED SEP 29 1966

Nathan J. Paulson/s/
Clerk

Before: McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of petitioners' petition for writ of mandamus and of respondent's opposition thereto, it is

ORDERED by the court that petitioners; aforesaid petition is denied.

Per Curiam

Circuit Judge Leventhal did not participate in the foregoing order.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
vs.	:	NO. 82-66
CARL F. HANSEN, et al.,	:	
Defendants.	:	

TRANSCRIPT OF PROCEEDINGS

Washington, D.C.

Date: October 25, 1966

Volume No. 26

Pages: 6571 - 6737 (Gross numbered)

Prepared For: PLAINTIFFS

ELAINE O. WELLS

Official Court Reporter
United States Court House
Washington 1, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION
vs.	:	
	:	NO. 82-66
CARL F. HANSEN, et al.,	:	
	:	
Defendants.	:	

Washington, D. C.
Tuesday, October 25, 1966

The above-entitled cause came on for further hearing before THE HONORABLE J. SKELLY WRIGHT, United States Circuit Judge, sitting by designation, at 10:00 a.m.

APPEARANCES:

On behalf of the Plaintiffs:

WILLIAM M. KUNSTLER, ESQUIRE
JERRY D. ANKER, ESQUIRE

On behalf of the Defendants:

JOHN A. EARNEST, ESQUIRE
JAMES M. CASHMAN, ESQUIRE
MATTHEW J. MULLANEY, ESQUIRE
WILLIAM F. PATTEN, ESQUIRE
ROBERT R. REDMON, ESQUIRE

C O N T E N T S

E X H I B I T S

C O N T E N T S

For the Plaintiffs	For Identification	In Evidence
A-34a - Table on page 9, right-hand side, from copy of American Education magazine, October, 1966 issue	6642	6710
A-37 - Table 22 of Bureau of Census Report, Selected Financial	6620	
A-38 - Data concerning Armed Forces mental test failures	6645	6707
A-39 - Document relating to achievement by region - Negro	6648	6716
A-40 - Letter of 9-9-66 from Col. Lee to Caryl Conner plus valley proofs (valley proofs withdrawn)	6650	6709
A-41 - Copy of Armed Forces Qualification Test (AFQT) for pamphlet	6657	6717
P-4 - 1964-65 Expenditures per pupil for elementary schools market	6659	6614
P-9 - 1964-65 Expenditures per pupil for junior and senior high schools	6631	6619
P-5 - Pupil membership in regular day schools on Oct. 22, 1964 compared with Oct. 17, 1963	6500	6615

E X H I B I T S

For the Plaintiffs	For Identification	In Evidence
V-14		6591
V-16		6704
V-18		6704
V-19 - Selected Data on District of Columbia Elementary Schools for the School Year 1962-63 through 1964-65	6592	6619
V-20 - Selected Data on District of Columbia Elementary Schools in the school year 1962-63	6593	6619
W-4		6676
W-4a		6676
W-31 - Code for D. C. Schools	6732	6733
For the Defendants		
46 -		6728
123 - Summary of Increases in operating expenses requested by Board of Education, approved by the Commissioners and appropriated by Congress 1953-1966	6719	6722
124 - District of Columbia population by race for the years indicated	6720	6722
125 - Pupil membership in regular day schools and average class size, by levels and race, for years indicated	6720	6722
126 - Distribution of pupils by curriculums and special programs in the school year 1964-65	6720	6722
127 - Scholarships won by students in senior high school	6720	6722
128 - Work scholarship program	6720	6722

E x h i b i t s

For the Plaintiffs	Ex. Identification	In Evidence
V-14		6591
V-15		6701
V-16		6704
V-19 - Selected Data on District of Columbia Elementary Schools for the School Year 1962-63 through 1964-65	6592	6619
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W-4		6676
W-4a		6676
W-31 - Code for D. C. Schools	6732	6733
For the Defendants		
46 -		6721
123 - Summary of Increases in operating expenses requested by Board of Education, approved by the Commissioners and appropriated by Congress 1953-1966	6719	6722
124 - District of Columbia population by race for the years indicated	6721	6722
125 - Pupil membership in regular day schools and average class size, by levels and race, for years indicated	6720	6722
126 - Distribution of pupils by curriculum and special programs in the school year 1964-65	6720	6722
127 - Scholarships won by students in senior high school	6720	6722
128 - Work scholarship program	6718	6722

E X H I B I T S

For the Defendants	For Identification	In Evidence
129 - Followup survey senior high school graduates for years indicated	6720	6722
130 - Percentages by race in the public schools for 1945 to present	6720	6722
131 - Special projects supported by funds other than District of Columbia government and deposited to the credit of the District of Columbia public schools	6721	6722
132 - Elementary school construction since 1958 by income levels of neighborhoods to be served	6721	6722
133 - Degrees held by teachers on October 22, 1964	6721	6722
134 - Staffing the District of Columbia public school system marked as exhibit	6721	6722
135 - District of Columbia public school construction	6721	6722
136 - Annual total operating expenditures per pupil in the regular elementary and secondary day schools 1955-56 through 1965-66	6721	6722
137 - Statement showing amount and source of funds and the number of free lunches provided for needy elementary school children	6722	6722
138 - Number of part-time classes in the elementary day schools at end of first six weeks in each year 1948-49 through 1964-65 and September 23, 1965	6722	6722

E X H I B I T S

For the Defendants	The Stipulation	Pg. Volume
128 - Pulsney survey senior high school graduates for years indicated	6721	6722
130 - Percentages by race in the public schools for 1945 to present	6721	6722
131 - Special projections made by Dade Wiley for Board of Commissioners of the District of Columbia regarding and depicting in the results of the District of Columbia public schools	6721	6722
132 - Elementary school enrollments since 1950 by income levels of neighborhoods to be served	6721	6722
133 - Petitions held by teachers on October 22, 1964	6721	6722
134 - Staffing the District of Columbia public school system marked as exhibit	6721	6722
135 - District of Columbia public school restructuring	6721	6722
136 - Annual total operating expenditures per pupil in the regular elementary and secondary day schools 1956-57 through 1963-64	6721	6722
137 - Statement showing school and source of funds and the number of first-grade students available for ready elementary school education	6721	6722
138 - Number of part-time classes in the elementary day schools as of end of first six weeks in each year 1957-58 through 1964-65, and September 22, 1965	6721	6722

E X H I B I T S

For the Defendants	For Identification	In Evidence
139 - Cross tracking by subjects in senior high schools	6723	6723
140 - Number of senior high school students with cross tracked programs	6723	6723
141 - American Education Magazine October, 1966, pages 8 and 9 as to all tables except last table on p. 9	6730	6730
For the Court		
1 - Resolution by Board of Education concerning present status of track system	6712	6712
For School Action Council		
1 - Summary of its organization	6736	

E X H I B I T S

For the Defendants	For Identification	In Evidence
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141 - American Education Magazine October, 1966, pages 8 and 9 as to all tables except last table on p. 9	6730	6730
For the Court		
1 - Resolution by Board of Education concerning present status of track system	6712	6712
For Pennsylvania Department		
1 - Summary of its organization	6736	

P R O C E E D I N G S

THE COURT: Good morning.

MR. PEER: Good morning, Your Honor. My name is William B. Peer. I am appearing here as counsel for the American Federation of Teachers, AFL-CIO, and Local 6 of that Federation, The Washington Teachers' Union.

There is before you a motion for leave to file --

THE COURT: Wait just a minute.

You may proceed, thank you.

MR. PEER: There is before you a motion for leave to file an amicus brief on behalf of the American Federation of Teachers and its Local 6, The Washington Teachers' Union.

We have affixed to the motion an affidavit signed by Mr. William H. Simons, the president of Local 6 of the American Federation of Teachers, in which he sets forth in that affidavit the interest of the teachers of Washington, D. C., and the teachers who are represented nationally by the American Federation of Teachers.

The American Federation of Teachers consists of a national labor organization numbering 125,000 members. They represent educational employees in the major urban centers in America today, New York City, Chicago,Philadelphia, Detroit, Boston.

P R O C E E D I N G S

THE COURT: Good morning.

MR. PEER: Good morning, Your Honor. My name is William S. Peer. I am appearing here as counsel for the American Federation of Teachers, AFL-CIO, and Local 6 of that Federation, The Washington Teachers' Union.

There is before you a motion for leave to file --

THE COURT: Wait just a minute.

You may proceed, thank you.

MR. PEER: There is before you a motion for leave to file an amicus brief on behalf of the American Federation of Teachers and its Local 6, The Washington Teachers' Union.

We have affined to the motion an affidavit signed by Mr. William S. Simpson, the president of Local 6 of the American Federation of Teachers, in which he sets forth in that affidavit the interest of the teachers of Washington, D. C., and the teachers who are represented nationally by the American Federation of Teachers.

The American Federation of Teachers consists of a national labor organization numbering 125,000 members. They represent educational employees in the major urban centers in America today, New York City, Chicago, Philadelphia, Detroit, Boston.

Most of the major metropolitan areas in the country are represented by locals of the American Federation of Teachers.

As a result of this representation of these urban center educational employees, we feel that the American Federation of Teachers has gained a considerable amount of expertise and knowledge in dealing with the problems presented in this particular law suit.

With respect to the interests of the Washington Teachers' Union, we feel that it is necessary for this Court's understanding of the issues presented in this case that the teachers of this school system have the opportunity to express their views in this litigation.

As you know, one of the plaintiffs is a public school teacher.

However, we do not feel that the presence of one school teacher as a plaintiff adequately protects the interests of all of the school teachers in Washington, D. C.

The Washington Teachers' Union therefore asked that in order to protect their interests in this litigation and in order to bring to your attention the views and opinions of the Washington teachers that they be granted leave to file an amicus brief in this case at the close of the evidence.

Most of the major metropolitan areas in the country are represented by locals of the American Federation of Teachers.

As a result of this representation of these urban center educational employees, we feel that the American Federation of Teachers has gained a considerable source of expertise and knowledge in dealing with the problems presented in this particular law suit.

With respect to the interests of the Washington Teachers' Union, we feel that it is necessary for this Court's understanding of the issues presented in this case that the members of this school system have the opportunity to express their views in this litigation.

As you know, one of the plaintiffs is a public school teacher.

However, we do not feel that the presence of one school teacher as a plaintiff adequately protects the interests of all of the school teachers in Washington, D. C.

The Washington Teachers' Union therefore moved that in order to protect their interests in this litigation and in order to bring to your attention the views and problems of the Washington teachers that they be granted leave to file an amicus brief in this case at the close of the evidence.

Now, it is not our intention to submit any new or different evidence, nor is our intention to inconvenience the Court or the parties or to extend the litigation in any way.

We have, therefore, suggested in the memorandum of points and authorities which I have submitted with the motion, that the filing date of the amicus brief be determined in accordance with Rule 18(j) (3) of the Court of Appeals of this circuit, which provides that the amicus brief shall be filed at or before the time of the filing of the appellee's brief.

In this case, of course, it would be the defendants'.

Thank you very much.

THE COURT: Do you know how many of the Washington school teachers, public school teachers, are members of the Union?

MR. PEER: Your Honor, we have presently a substantial number of the teachers in the system who are members of the Washington Teachers' Union.

We have been reluctant to advise the public as to the exact number because we are presently engaged in a representation dispute before the School Board.

We are asking for a collective bargaining election to determine who is the exclusive representative of the teachers in Washington, D. C.

Now, it is not our intention to submit any new or different evidence, nor is our intention to jeopardize the Court or the parties or to extend the litigation in any way.

We have, therefore, suggested in the memorandum of points and authorities which I have submitted with the motion, that the filing date of the motion brief be determined in accordance with Rule 18(1) (3) of the Court of Appeals of this District, which provides that the motion brief shall be filed at or before the time of the filing of the appellee's brief.

In this case, of course, it would be the defendants'.

Thank you very much.

THE COURT: Do you know how many of the Washington school teachers, public school teachers, are members of the Union?

MR. FEIN: Your Honor, we have presently a substantial number of the teachers in the system who are members of the Washington Teachers' Union.

We have been reluctant to advise the public as to the exact number because we are presently engaged in a representation dispute before the School Board.

We are asking for a collective bargaining election to determine who is the exclusive representative of the teachers in Washington, D. C.

We are asking that the procedures of the Executive Order of President Kennedy be applied to the school teachers of Washington in order to accord them collective bargaining rights with the School Board.

We do not know what the outcome of such an election would be.

As you know, there is another organization in Washington called the District of Columbia Education Association, an affiliate of the National Education Association.

They, too, claim to represent a substantial number of employees in the public school system.

We do not know their total membership. They do not know our total membership.

And we are going to have to wait for a collective bargaining election or a representation election, that is, to determine exactly the affiliation of all of the teachers.

But we do know from the regular dues check-off procedure which is being administered by the School Board that we do represent a substantial number of the teachers in the school system.

I might say that the action of the Teachers' Union in this case was taken at a general membership meeting.

The action of the American Federation of Teachers,

We are asking that the procedures of the Executive Order of President Kennedy be applied to the school employees of Washington in order to assure them collective bargaining rights with the School Board.

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We do not know their total membership. They do not know our total membership.

And we are going to have to wait for a collective bargaining election or a representation election, that is, to determine exactly the affiliation of all of the teachers.

But we do know from the regular dues check-off procedure which is being administered by the School Board that we do represent a substantial number of the teachers in the school system.

I might say also the action of the Teachers' Union in this case was taken at a general membership meeting.

The action of the American Federation of Teachers,

the national union was taken in Executive Council meeting in Chicago in August and was unanimously adopted.

THE COURT: All right, sir.

MR. CASHMAN: Your Honor, may I make some remarks --

THE COURT: Yes.

MR. CASHMAN: -- with respect to the motion.

May it please the Court, we respectfully oppose the motion filed by the prospective amicus on the following grounds:

First of all, Your Honor, I think the Court put its finger most succinctly on what the most immediate real problem is, that is, how qualified and to what extent should this union speak for the teachers in the District of Columbia?

Now, Your Honor, I would like to hark back briefly to a little history in this law suit, just to make it clear on the record exactly what we have experienced with respect to the Washington Teachers' Union as it is locally carried on.

Your Honor, when we heard -- and we heard by virtue of the newspaper -- that the Washington Teachers' Union was interested in coming into this law suit as an amicus, we thought that it would be well for us to find out exactly what the Court posed to counsel today, that is, how many teachers do you represent?

In connection with that effort, Your Honor, we filed

the national union was taking in Executive Council meeting in Chicago in August and was unanimously adopted.

THE COURT: All right, sir.

MR. CASHMAN: Your Honor, may I make some remarks --

THE COURT: Yes.

MR. CASHMAN: -- with respect to the motion.

May it please the Court, we respectfully oppose the motion filed by the prosecutive unions on the following grounds:

First of all, Your Honor, I think the Court put its finger most succinctly on what the most immediate real problem is, that is, how qualified and to what extent should this union speak for the teachers in the District of Columbia?

Now, Your Honor, I would like to back back briefly to a little history in this law suit, just to make it clear to the record exactly what we have experienced with respect to the Washington Teachers' Union as it is locally termed.

Your Honor, when we heard -- and we heard by virtue of the newspaper -- that the Washington Teachers' Union was interested in coming into this law suit as an amicus, we thought that it would be well for us to find out exactly what the Court posed to consent today, that is, how many teachers do you represent?

In association with that effort, Your Honor, we filed

-- let's say this was roughly three weeks ago -- we filed a subpoena upon Mr. Simons, who is either the president or the executive director -- I am not sure which -- with a request that he bring with him the documentation for their participation as an amicus and the extent to which they represent school teachers in the District of Columbia.

Well, after that subpoena was served counsel for the Union and for Mr. Simons called and indicated that he couldn't appear at the deposition on account of the fact that he had to go out of town and was preparing to go out of town and asked that we reset the deposition for a time after he returned. I believe he was going to Philadelphia or somewhere.

Then, Your Honor, we agreed to that, and it was continued indefinitely.

Shortly after that, upon the return of counsel, we received a letter from Mr. Peer that is dated October 3, 1966 -- which would mean, Your Honor, that our service of the subpoena must have been more like a month or five weeks ago -- but it indicated that it was notification to "you that, upon the advice of counsel, Mr. William H. Simons, will be unable to appear for the taking of his deposition, and that he respectfully declines to produce the documents requested."

Your Honor, the letter is rather long, but it sets

forth the reasons why Mr. Simons would not appear.

Now, Your Honor, on account of the press of this trial, frankly, we did not pursue the matter any further.

The next occasion that we had to discover the participation of the Washington Teachers' Union was yesterday when there was hand delivered to our office a copy of the motion indicating that WTU was going to appear in this Court the following morning for the purposes counsel has already announced.

So, Your Honor, I just want to indicate that the concern that the Court had and has for what the Union represents in terms of District school teachers, is also our concern and it is a matter that we think is most pertinent to their coming in as an amicus.

Now, Your Honor, I indicated before that -- well, before I leave that point, let me just conclude it by saying this:

Your Honor, I think that the Court should know, I think that the parties should know to what extent the Teachers' Union does represent teachers in the District of Columbia.

I believe that before an intelligent judgment can be made as to their status as an amicus, Your Honor, that should come out and it should come out, in our view, Your Honor, by the honoring of the subpoena for the deposition upon Mr. Simons.

Now, as I said, Your Honor, the prospective par-

forth the reason why Mr. Simons would not appear.

Now, Your Honor, on account of the press of this trial, finally, we did not pursue the matter any further.

The next occasion that we had to discover the participation of the Washington Teachers' Union was yesterday when there was delivered to our office a copy of the motion indicating that MTL was going to appear in this case via Williams moving for the purpose mentioned has already mentioned.

So, Your Honor, I just want to indicate that the concern that the Court had and has for what the Union represents in terms of district school teachers, is also our concern and it is a matter that we think is most pertinent to their coming in as an amicus.

Now, Your Honor, I indicated before that -- well, before I leave that point, let me just conclude it by saying this:

Your Honor, I think that the Court should know, I think that the parties should know to what extent the Teachers' Union represent teachers in the District of Columbia.

I believe that before an intelligent judgment can be made as to their status as an amicus, Your Honor, that should be cut and it should come out, in our view, Your Honor, by the insertion of the subpoena for the deposition upon Mr. Simons.

Now, as I said, Your Honor, the prospective par-

ticipation of WTU came to our attention back in -- well, I would say, first, in September -- September 1, 1966, when an article appeared, and I believe it appeared in the Star -- I am not sure of that, Your Honor, but I believe it appeared in the Star -- and it was entitled: "Hobson Suit Backed by Teacher Unit."

> "The executive council of the 130,000-member American Federation of Teachers has voted to join the union's Washington local in filing a brief supporting Julius W. Hobson's de facto segregation suit against the District Schools.
>
> "The council's action came at the union's recent national convention in Chicago. The union's general counsel, John Lightenberg, will come to Washington to observe the remainder of the trial when the U. S. District Court resumes hearings in two weeks.
>
> "According to William Simons, president of the Washington Teachers' Union, the local and the national organization are interested in supporting Hobson's contention that students in predominately white schools in the District have better educational opportunities than children in predominately Negro

disciplinin of NTU come to our attention last fall -- well, I would say, first in September -- September 1, 1967, such an article appeared, and I believe it appeared in the Star -- I am not sure of that, Your Honor. But I believe it appeared in the Star -- and it was entitled: "Hobson Suit Backed by Teacher Unit."

"The executive council of the 130,000-member American Federation of Teachers has voted to join the union's Washington local in filing a brief amicus curiae in Julius W. Hobson's de facto segregation suit against the District Schools.

"The council's action came at the union's recent national convention in Chicago. The union's general counsel, Jack Litzenberg, will come to Washington to observe the commencement of the trial when the U. S. District Court resumes hearings in two weeks.

"According to William Simons, president of the Washington Teachers' Union, the local and the national organization are interested in supporting Hobson's contention that students in predominately white schools in the District have better educational opportunities than children in predominately Negro

schools.

"Simons, who is also a member of the national executive council, is also considering giving financial support to Hobson."

Your Honor, the rest of the article deals with the D. C. Teachers' Association and the National Education Association.

However, Your Honor, as I say, this caused us concern, and this I think points up that the rule of the amicus as we understand it in the brief time we have had to consult it, is not being followed if Washington Teachers' Union is permitted to come in to this law suit, because as we understand the law, Your Honor, of the amicus curiae, it is intended by its root derivation to mean a friend to the Court.

Now I think that what is implied in that in legal terms is that the Court will derive the benefit of an objective view, an objective presentation.

Your Honor, the device of amicus curiae was not used or should not be used to line up further partisans in this law suit, as it should not be used to line up partisans in any suit.

Your Honor, for that reason we do not believe that the Washington Teachers' Union, without further exposition,

schools.

"Simons, who is also a member of the national executive council, is also considering giving financial support to Hobson."

Your Honor, the rest of the article deals with the [illegible] activities and the National Association tion.

However, Your Honor, as I say, this caused us concern, and this I think points up that the rule of the majority as we understand it in the brief time we have had to consider it, is not being followed if Washington Teachers' Union is permitted to come in to this law suit, because as we understand the law, Your Honor, of the major parties, it is intended by its root derivation to mean a friend to the Court.

Now I think that what is implied in that in legal terms is that the Court will derive the benefit of an objective view, an objective presentation.

Your Honor, the device of amicus curiae was not meant to should not be used to line up further positions in this law suit, as it should not be used to line up positions in any suit.

Your Honor, for that reason we do not believe that the Washington Teachers' Union, without further suggestion,

qualifies as a friend of the Court.

In connection, Your Honor, with the partisanship of the Washington Teachers' Union, it is my current belief, and I don't have the documentation here -- it is my current belief that in February, 1965, when a public hearing was held with respect to how different associations within the city felt about the track system, the Washington Teachers' Union came in and vigorously opposed the track system.

As you know, Your Honor, the track system is one of the focal issues in this law suit.

Now, Your Honor, in connection with their protection of the teachers and the participation of the teachers in this law suit, it seems to me that we have had no testimony from teachers as such in this law suit.

We have had, surely, a nominal plaintiff, Carolyn Hill Stewart, I believe, who would be the only party to qualify as a teacher, and as Your Honor is well aware, she withdrew from active participation in this law suit at the very outset and has filed a letter with the Court indicating her reasons why.

Now, Your Honor, therefore, we think that the participation of teachers in this suit has been, as I say, nil.

I would also think, Your Honor, that there is a

qualifies as a friend of the Court.

In conclusion, Your Honor, with the participation of the Washington Teachers' Union, it is my current belief, and I don't have the documentation here -- it is my current belief that in February, 1947, when a public meeting was held with members of two different management unions within the city full about the track system, the Washington Teachers' Union came in and vigorously opposed the track system.

As you know, Your Honor, the track system is one of the focal issues in this law suit.

Now, Your Honor, in connection with their protection of the teachers and the participation of the members in this law suit, it seems to me that we have had no testimony from teachers as such in this law suit.

We have had, merely, a nominal plaintiff, Cecelia Hill Stewart, I believe, who would be the only party to qualify as a teacher, and as Your Honor is well aware, she withdrew from active participation in this law suit at the very outset and has filed a letter with the Court indicating her reasons why.

Now, Your Honor, therefore, we think that the participation of teachers in this suit has been, as I say, nil.

I would also think, Your Honor, that there is a

necessity for the Court to know and for the parties to know exactly what it was that authorizes the Washington Teachers' Union to come in and say that they want to participate.

I think that we ought to have a copy of the resolution that was passed out in Chicago, if such it were, or if there was a local determination that WTU was going to participate in this suit, that that also be furnished to the Court.

Your Honor, all I am saying is that for all the reasons that I have announced, the defendants oppose the appearance of the Washington Teachers' Union as a participant, amicus curiae in this matter.

THE COURT: Thank you. Does anybody else want to say anything?

Would you like to respond?

MR. PEER: Your Honor, this is the first time that I have ever heard that the partisanship of an individual, a group of persons, ever barred an amicus curiae brief.

As I am sure you know, and I will not belabor the issue, if this were the standard, the AFL-CIO, the National Association of Manufacturers, or anyone else would be barred from submitting an amicus brief either in this court or in the Supreme Court of the United States.

Partisanship to the extent that it may or may not

necessary for the Court to know and for the parties to know exactly what it was that authorized the Washington Teachers' Union to come in and say that they want to participate.

I think that we ought to have a copy of the resolution that was passed out in Chicago. If and if it was, so it there was a local determination that WTU was going to participate in this suit, that that also be furnished to the Court.

Your Honor, all I am saying is that for all the reasons that I have mentioned, the defendants oppose the appearance of the Washington Teachers' Union as a participant, amicus curiae in this matter.

THE COURT: Thank you. Does anybody else want to say anything?

Would you like to respond?

MR. PRER: Your Honor, this is the first time that I have ever heard that the participation of an individual, a group of persons, ever barred an amicus curiae brief.

As I am sure you know, and I will not belabor the point, if this were the standard, the AFL-CIO, the National Association of Manufacturers, or anyone else could be barred from submitting an amicus brief either in this court or in the Supreme Court of the United States.

Particularly in the matter that it may or may not

exist in this case, has never been a bar, and I don't believe that you can properly accept it as a bar, to the filing of an amicus brief.

May I say that with respect to the partisanship claim, there has been recitation to certain statements, certain newspaper articles, that the interests of the Teachers' Union are aligned with those of the plaintiffs in this case.

I would like to draw to your attention the fact, however, that in the papers which are before you, and the affidavit which Mr. Simons has attached to the motion, there is the assertion also that those interests may not be the same.

For example, there has been considerable argument here with respect to the differences between temporary teachers, permanent teachers, and probationary teachers.

As I understand the argument, the plaintiffs are contending that temporary teachers are in certain respects less well qualified, less better able to teach the students of Washington, D. C., than the permanent teachers that are found in some of the predominately white schools.

The Teachers' Union has a firm opinion on that particular contention and I think it well behooves the Court to be interested in that position and I think it would materially advance and profit the parties if the opinion of the Teachers'

point in this case, has never been a lie. And I don't believe that you can properly accept it as a lie in the filing of an amicus brief.

May I say that with respect to the participation claim, there can been recitation in certain arguments, certain memoranda articles, that the documents of the teachers' union are aligned with those of the plaintiffs in this case.

I would like to draw to your attention the fact, however, that in the papers which are before you, and the affidavit which Mr. Atkins has attached to the motion, there is the assertion also that those interests may not be the same.

For example, there has been considerable argument here with respect to the difference between temporary teachers, permanent teachers, and probationary teachers.

As I understand the argument, the plaintiffs are contending that temporary teachers are in certain respects less well qualified, less better able to teach the students of Washington, D.C., than the permanent teachers that are found in some of the predominately white schools.

The Teachers' Union has a firm opinion on that particular contention and I think it will behoove the Court to be interested in that position and I think it would certainly advance and profit the parties if the opinion of the Teachers'

Union with respect to the differences between temporary, permanent and probationary teachers were brought to the attention of the Court in the form of an amicus situation, amicus brief.

Now, with respect to the number of employees that we represent, and going back again to the question which you raised, only a representation election, Your Honor, can determine this issue.

We have felt all along that there are a number of ways of determining adherence to a union.

You can look at it in terms of actual membership in the union.

You can look at it in terms of the amount of dues that are checked off regularly by the School Board.

But really the only way that you can determine the number of adherents to a particular organization is through a representation election.

We have not yet had that representation election. The prospects are that the representation election will not be held until this trial and the briefing schedule in this case is completed.

Now, let me go on, Your Honor, because mention has been made with reference to the subpoena.

I would like to hand up to you for your consideration

Dalos with respect to the differences between temporary, permanent and probationary teachers was brought to the attention of the Court in the form of an amicus brief.

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You can look at it in terms of actual membership in the union.

You can look at it in terms of the amount of dues that are checked off regularly by the School Board.

But really the only way that you can determine the number of adherents to a particular organization is through a representational election.

We have not yet had that representation election. The prospects are that the representation election will not be held until this trial, and the trial-and-error approach in this case is complicated.

Now, let me go on, Your Honor, because mention has been made with reference to the subpoena.

I want like to hand up to you for your consideration

the subpoena which we refused to honor in this case. I would like to also do what counsel for the defendants did not do and that is refer to the reasons which we had for not honoring that subpoena in this case.

Now, recall, this was a subpoena which was served upon Mr. Simons as an individual representing the Washington Teachers' Union.

It was served upon him at a time when the Teachers' Union was not yet even in the process of filing an amicus brief or a request for leave to file an amicus brief.

We took the position that at that time the issues raised in this subpoena were totally irrelevant to the issues present in this case.

Secondly, to the extent that the subpoena required the production of documents and other written evidence, we felt that the Corporation Counsel's office had not complied with the provisions of Rule 34 and Rule 35 of the Federal Rules of Civil Procedure, which requires a showing of good cause for the production of documents.

Third, we took the position that the subpoena was grossly broad, unreasonable and oppressive.

Many of the documents which are requested in there in terms of communication between the Washington Teachers'

the subpoena which we refused to honor in this case. I would like to also on what counsel for the defendants did and do and then in refer to the reason which we had for not honoring that subpoena in this case.

Now, recall, this was a subpoena which was served upon Mr. Simons as an individual representing the Washington Teachers' Union.

It was served upon him at a time when the Teachers' Union was not yet even in the process of filing an unions intent as a requisite for being to file an unions brief.

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Secondly, to the extent that the subpoena required the production of documents and other written evidence, we felt that the Corporation Counsel's office had not complied with the provisions of Rule 34 and Rule 37 of the Federal Rules of Civil Procedure, which requires a showing of good cause for the production of documents.

Thirdly, we took the position that the subpoena was grossly broad, unreasonable and oppressive.

Many of the documents which are requested in there in terms of communication between the Washington Teachers'

Union and the School Board were already in the possession of the School Board.

There is no terminal date placed on any of the requests. They can go back for the entire length of time that the Washington Teachers' Union has existed.

Secondly, and finally, you will note that the Corporation Counsel's office did not simply ask for the numbers of members.

They asked for the numbers of members in this union by different job classifications on the basis of race.

And I cited in my letter the decision of the Supreme Court of the United States in Bates versus the City of Little Rock, 361 U. S. 516, decided in 1960, in which the Supreme Court of the United States held that Mrs. Bates, on behalf of the NAACP did not have to reveal under any circumstances the membership list of the NAACP.

Finally, in the letter I said as follows:

> "Fifth, under the foregoing circumstances, wherein the subpoena is so imbued with constitutional and legal objections, we have reason to question the good faith of your office in issuing the subpoena in the first place, and the purposes for which the information sought is to be used.

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They asked for the members of members in this union by different job classifications on the basis of race.

And I cited in my letter the decision of the Supreme Court of the United States in Bates versus the City of Little Rock, 361 U. S. 516, decided in 1960, in which the Supreme Court of the United States held that Mrs. Bates, on behalf of the NAACP did not have to reveal under any circumstances the membership list of the NAACP.

Finally, in the letter I said as follows:

"Fifth, under the foregoing circumstances, wherein the subpoena is so imbued with constitutional and legal objections, we have reason to question the good faith of your office in issuing the subpoena in the first place, and the purposes for which its information sought is to be used.

"If you persist in this matter, and if you seek a Court order on the subpoena, we will be obliged to bring to the Court's attention facts which lead us to believe that the subpoena is an attempt (a) to force the Teachers' Union of Washington, D. C., to withdraw public support for the plaintiffs; (b) to coerce the Union in the exercise of constitutionally protected rights and privileges, including the sacred right to redress injury through the courts; and (c) to embarrass and intimidate the Union in the midst of labor campaign to organize and represent the teachers as their bargaining agent."

I have nothing further, Your Honor.

Thank you very much.

THE COURT: Well, the Court will take the matter under submission.

Do you want to say something?

MR. CASHMAN: Yes, Your Honor. I just want to make one brief remark.

Your Honor, on account of the newspaper report that we had that the Washington Teachers' Union was contemplating financially assisting the plaintiffs, that was the reason for that subpoena and for the taking of the deposition.

"If you persist in this matter, and if you seek a Court order on the subpoena, we will be obliged to bring to the Court's attention facts which lead us to believe that the subpoena is an attempt (a) to force the Teachers' Union of Washington, D. C., to violate public support for the plaintiffs; (b) to coerce the union in the exercise of constitutionally protected rights and privileges, including the sacred right to express injury through the courts; and (c) to embarrass and intimidate the Union in the midst of labor campaign to organize and represent the teachers as their bargaining agent."

I have nothing further, Your Honor.

Thank you very much.

The Court: Well, the Court will take the matter under submission.

Do you want to say something?

Mr. CARTER: Yes, Your Honor. I just want to make one brief remark.

This Union is aware of the newspaper report that we had sued the Washington Teachers' Union was contemplating financially assisting the plaintiffs, that was the reason for that response and for the taking of the deposition.

Your Honor, we felt that we were fully entitled to know, having been thus alerted.

Your Honor, I don't want to argue the merits of the subpoena before this Court at this time.

THE COURT: Well, just as an observation, I don't know on what rationalization you wanted to know the membership of the union by race.

MR. CASHMAN: Well --

THE COURT: It seems to me that this is a --

MR. CASHMAN: Your Honor, the figures by race have become so much a part of this law suit and since the Washington Teachers' Union wanted to participate in this law suit -- we have broken down everything we possibly can in terms of race for the purposes of this law suit, Your Honor.

Your Honor is well aware that the school system itself makes one total head count by race only.

But, Your Honor, this law suit deals with teachers by race and we wanted to know, therefore, what Washington Teachers' Union had by way of representation in teachers by way of race.

That was our rationalization, Your Honor.

THE COURT: Obviously, ordinarily, whenever a person or a group wants to submit a brief amicus, why the Court

Your Honor, we felt that we were fully entitled to know, having been thus alerted.

Your Honor, I don't want to argue the merits of the subpoena before this Court at this time.

THE COURT: Well, just as an observation, I don't know on what rationalization you sought to have the membership of the union by race.

MR. CASHMAN: Well --

THE COURT: It seems to me that this is a --

MR. CASHMAN: Your Honor, the figures by race have become so much a part of this law suit and since the Desegregation Teachers' Union wished to participate in this law suit -- we have looked upon everything we possibly can in terms of race for the purposes of this law suit, Your Honor.

Your Honor is well aware that the school system itself makes one total head count by race only.

And Your Honor, this law suit deals with teachers by race and we wished to know, therefore, what Desegregation Teachers' Union had by way of representation in teachers by way of race.

That was our rationalization, Your Honor.

THE COURT: Obviously, ordinarily, however a person as a group wants to submit a brief motion, why the Court

ordinarily welcomes the brief for whatever use it can be and whatever use it can serve.

And as counsel has pointed out an amicus is really a misnomer ordinarily, too, because an amicus usually serves one side or the other, not always,but usually.

I have another concern about this motion, however, and that is the fact that there appear in progress proceedings looking toward a representative election in connection with the teachers of the schools.

I am not at all certain that this case ought to be encumbered, nor should the election proceedings be encumbered by the controversy that might arise out of participation, even as amicus in these proceedings.

Anyway, the matter is taken under submission.

We will proceed now.

MR. KUNSTLER: Your Honor, we have Mr. Hobson for a very brief presentation.

THE COURT: Before Mr. Hobson takes the stand, the Clerk has reminded me that we overlooked V-14 in connection with our discussion of objections to the evidence in this case.

Mr. Cashman, I think it is up to you to say whether or not you have any objection to this.

MR. CASHMAN: Your Honor, my recollection is that Mr.

ordinarily welcome the trial for whatever use it can be and whatever use it can serve.

And as counsel has pointed out an amicus is really a misnomer certainly. Yes, because we minor usually serve one side or the other, not always,but usually.

I have another concern about this matter, however, and that is the fact that there appear in progress proceedings looking toward a representative election in connection with the employees of the schools.

I am not at all certain that this case ought to be segregated, for should the election proceedings be encumbered by the controversy that might arise out of participation, even as amicus in these proceedings.

Anyway, the matter is taken under submission.

We will proceed now.

MR. KUNSTLER: Your Honor, we have Mr. Hobson for a very brief presentation.

THE COURT: Before Mr. Hobson takes the stand, the Clerk has remanded me that we previously R-14 in connection with our discussion of objections to the evidence in this case.

Mr. Chairman, I think it is up to you in any manner or not you have any objection to this.

MR. CASHMAN: Your Honor, my recollection is that Mr.

Mullaney did the cross-examination.

May I briefly consult with him for half a minute?

THE COURT: Very well.

MR. CASHMAN: No objection, Your Honor.

THE COURT: All right.

Let it be admitted without objection.

(Plaintiffs' Exhibit No. V-14 admitted in evidence.)

MR. Hobson, will you take the stand, sir?

MR. KUNSTLER: Your Honor, while Mr. Hobson is taking the stand, we have one witness in the courtroom who is not an expert witness, and that is Miss Conner, who I think is sitting back there.

I want to know if you want to invoke the rule with reference to Miss Conner?

MR. CASHMAN: Yes, Your Honor.

THE COURT: All right.

Will you ask Miss Conner to go to the witness room.

Whereupon

JULIUS HOBSON

was called by the plaintiffs in rebuttal, and resumed the witness stand, having been previously duly sworn, and was further examined and testified as follows:

Mullaney did the cross-examination.

May I briefly consult with him for half a minute?

THE COURT: Very well.

MR. CARPMAN: No objection, Your Honor.

THE COURT: All right.

Let it be admitted without objection.

(Plaintiffs' Exhibit No. V-14 admitted in evidence.)

Mr. Hobson, will you take the stand, sir?

MR. [illegible]: Your Honor, while Mr. Hobson is taking the stand, we have one witness in the courtroom who is not an expert witness, and that is Miss Conner, who I think is sitting back there.

I want to know if you want to invoke the rule with reference to Miss Conner?

MR. [illegible]: Yes, Your Honor.

THE COURT: All right.

Will you ask Miss Conner to go to the witness room.

[illegible]

JULIUS HOBSON

was called by the plaintiffs in rebuttal, and resumed the witness stand, having been previously duly sworn, and was further examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUNSTLER:

Q Mr. Hobson, at my request did you study Defendants' Exhibit No. 51?

A Yes, I did study Defendants' Exhibit 51.

Q Now, also at my request, did you prepare two charts with reference to the same material covered in Exhibit 51?

A Yes, I did.

I prepared one chart called Selected Data on District of Columbia Elementary Schools for the school year 1962-63 through 1964-65.

And I prepared another separate tabulation or chart called Selected Data on the District of Columbia Elementary Schools in the school year 1962-63.

Q May I have those and we will have them marked.

MR. KUNSTLER: Mr. Clerk, would you mark the large one as V-19?

THE DEPUTY CLERK: Plaintiffs' Exhibit No. V-19 marked for identification.

(Chart marked as Plaintiffs' Exhibit No. V-19 for identification)

MR. KUNSTLER: This is V-20.

THE DEPUTY CLERK: Plaintiffs' Exhibit No. V-20 marked for identification.

DIRECT EXAMINATION

BY MR. KUNSTLER:

Q Mr. Hobson, at my request did you study Defendants' Exhibit No. S12?

A Yes, I did study Defendants' Exhibit S1.

Q Now, also at my request, did you prepare two charts with reference to the same material covered in Exhibit S12?

A Yes, I did.

I prepared one chart called Selected Data on District of Columbia Elementary Schools for the School Year 1963-64 (School 1964-65).

And I prepared another separate tabulation or chart called Selected Data on the District of Columbia Elementary Schools in the school year 1962-63.

Q May I have those and we will have them marked.

MR. KUNSTLER: Mr. Clerk, would you mark the large one as V-19?

THE DEPUTY CLERK: Plaintiffs' Exhibit No. V-19 marked for identification.

(Chart marked as Plaintiffs' Exhibit No. V-19 for identification)

MR. KUNSTLER: This is V-20.

THE DEPUTY CLERK: Plaintiffs' Exhibit No. V-20 marked for identification.

(Chart marked as Plaintiffs' Exhibit No. V-20 for identification.)

BY MR. KUNSTLER:

Q. Now, Mr. Hobson, did you turn over these charts during the week-end to the District of Columbia Corporation Counsel's office?

A. Yes. As we agreed, I took the first chart down to the Corporation Counsel's office at 2:30 on Saturday.

Q. You say first chart. Which one are you referring to?

A. I am referring to Plaintiffs' Exhibit V-19.

Q. What about V-20?

A. V-20 I took down to the Corporation Counsel's office on Sunday morning.

Q. When did you receive them back?

A. I received these back -- I went by the District Building and picked them up about seven o'clock last night.

Q. Now, with reference to V-19, would you indicate to the Court what you have done on V-19, where the statistics which are on the chart came from, and what the purpose of the chart is.

A. First, let me say that the entire sources, all of the sources for this chart are Plaintiffs' Exhibit P-7, P-6, P-5 and P-8.

These have to do with school population or pupil

(Chart marked as Plaintiffs' Exhibit No. V-20 for identification.)

BY MR. KUNSTLER:

Q Now, Mr. Hobson, did you turn over these charts during the mail-out to the District of Columbia Corporation Counsel's office?

A Yes. As we agreed, I took the first chart down to the Corporation Counsel's office at 1:30 on Saturday.

Q You say first chart. Which one are you referring to?

A I am referring to Plaintiffs' Exhibit V-19.

Q What about V-20?

A V-20 I took down to the Corporation Counsel's office on Sunday morning.

Q When did you receive them back?

A I received these back -- I went by the District Building and picked them up about seven o'clock last night.

Q Now, with reference to V-20, would you indicate to the Court what you have done on V-20, where the statistics which are on the chart come from, and what the purpose of the chart is.

A First, let me say that the entire exercise, all of the squares for this chart are Plaintiffs' Exhibit P-7, P-8, P-9 and P-4.

Items have to do with school population or pupil

membership. And Defendants' Exhibit 51, and the House Committee on Education and Labor hearings before the Task Force on Anti-poverty in the District of Columbia in October, '65, and in January, '66, pages 66 to 68, which deal with the income level of the communities in which these schools are located.

This chart I am looking at now, V-19, which takes into consideration three school years, I have divided the schools into groups of ten, rather than the 20 percent or the 26 schools that were utilized in Mr. Carroll's group in exhibit -- I mean, Defendants' Exhibit 51.

Three or four observations can be made on the basis of the figures in these charts.

One is that in Mr. Carroll's group of 26 schools, at the top, in the top cost schools and 26, I believe, or 20 percent in the low cost schools, he talks about or shows a spread of $139.84 between the average expenditure per pupil at the bottom and the average expenditure per pupil at the top.

Taking this same year and dividing these schools into groups of ten, ten lower and ten top, I find a spread of -- between these schools -- of an average of about $214.

I also find on my chart that the -- looking at the income levels of the neighborhood of the top ten schools, that almost all of the top ten schools are in what can be considered

[illegible] Mr. Dwyer: [illegible] 32, and the total [illegible] on Desegregation and Lower Standards before the Task Force on Equity [illegible] in the Distribution of Variables in Consolidation, '43, and in Equity, '66, pages 66 to 68, which deal with the income level of the communities in which these schools are located.

This chart I am looking at now, V-19, which takes into consideration these school years, I have divided the schools into groups of ten, rather than the 20 percent or the 26 schools that were utilized in Mr. Carroll's group in [illegible] -- I mean, Defendants' Exhibit 51.

Three or four observations can be made on the basis of the figures in these charts.

One is that in Mr. Carroll's group of 26 schools, at the top, in the top ten schools and [illegible] I believe, or 38 percent in the low cost schools, he talks about or shows a spread of $139.84 between the average expenditure per pupil at the bottom and the average expenditure per pupil at the top.

Taking this same year and dividing these schools into groups of ten, the lower and the top. I find a spread of -- between these schools -- of an average of about $214.

I also find on my chart that the -- looking at the income levels of the neighborhood of the top ten schools, that almost all of the top ten schools are in what can be considered

the middle and upper income ranges.

In other words, Key School, for example, which is a very high cost school, is located in a neighborhood in which the median income is $14,000 a year and over and it has only zero point six percent black pupils.

These schools also in this chart were arrayed by the percent of pupils in the schools.

Jackson, which is the highest school cost-wise, in this top ten, has 15 percent or rounded to 16 percent black pupils.

Carver, for example, which is in the $5,000 bracket and in the high cost schools is 100 percent. It is segregated black pupils.

Down at the bottom of the chart, all of the ten schools at the bottom were for all practical purposes, and by definition these are the low cost schools, ten schools, segregated.

The lowest ratio of black pupils in these schools rounded to 74.9 percent. The rest of them are from 78 up to 99.0 percent black.

So the low cost ten schools in the District of Columbia based on these exhibits which I named are located, as this chart shows, in the poorer neighborhoods and the high cost schools then are generally located in the rich neighborhoods.

the middle and upper income ranges.

In other words, Key School, for example, which is a very high cost school, is located in a neighborhood in which the median income is $14,444 a year and yet it has only zero point six percent black pupils.

These schools also in this chart were arrayed by the percent of pupils in the schools.

Jackson, which is the highest school cost-wise, in this top ten, has 14 percent or rounded to 14 percent black pupils.

Carver, for example, which is in the 70,000 bracket and in the high cost schools is 100 percent. It is segregated black pupils.

Down at the bottom of the chart, all of the ten schools at the bottom were for all practical purposes, and by definition these are the low cost schools, ten schools, segregated.

The lowest ratio of black pupils in these schools ranged in 74.5 percent. The rest of them are from 78 up to 99.9 percent black.

So the low cost ten schools in the District of Columbia based on these exhibits which I mentioned are located, as this chart shows, in the poorer neighborhoods and the high cost schools they are generally located in the rich neighborhoods.

In the school year 1962-63, which is what we are talking about now, based on Defendants' Exhibit 51 about 8.3 percent of all the white children in the elementary schools were in the top ten schools, while only 1.7 percent of the black children enrolled in the elementary schools in that year were in the top ten schools.

Now, if you move to 1963-64, on this V-19, you will find Mr. Carroll did not do this year, so there was no -- I wouldn't have a spread which he put into the record, but I did it on the basis of ten top schools and ten bottom schools.

Again all of the bottom schools with the exception of Hendley were almost completely segregated.

Hendley had 56.6 percent black students, so I guess you could call that an integrated school.

There were some black segregated schools in the upper ten cost schools in the school year 1963-64.

And in this school year 1963-64, the lowest ten schools ranked by expenditure per pupil contained 9.3 percent of all black elementary school children in the District of Columbia with about 7.3 percent of all whites in the elementary schools located in these schools -- registered elementary children located in these lower ten schools.

And the spread between expenditure per pupil in the

In the school year 1962-63, which is what we are talking about now, based on Superintendent Kuhlmann's about 42 percent of all the white children in the elementary schools were in the top ten schools, while only 2.7 percent of the black children enrolled in the elementary schools in that year were in the top ten schools.

Now, if you move to 1963-64, on this V-19, you will find Mr. Carroll did not do this year. My chart was so -- I wouldn't have a spread which he put into the record. But I did have the basis of ten top schools and ten bottom schools.

Again all of the bottom schools with the exception of Hendley were almost completely segregated.

Hendley had 56.6 percent black students, so I guess you could call that an integrated school.

There were some black segregated schools in the upper ten cost schools in the school year 1963-64.

And in this school year 1963-64, the lowest ten schools ranked by expenditures per pupil averaged 9.2 percent of all black elementary school children in the district of Columbia with about 3.3 percent of all whites in the elementary schools. Located in these schools -- Negro elementary children located in these lower ten schools.

And the spread between expenditure per pupil in the

two groups was $257.

Moving over to the last school year which we looked at on V-19, which was the school year 1964-65, again Mr. Carroll did not consider this year, so I don't know what spread he would get with 26 schools.

But I foundthe spread between the high cost ten schools in '64-'65 and the low cost ten schools in the same year of approximately $209.

In other words, the average expenditure in the high cost schools was $209 higher than the average expenditure in the low cost schools.

Here again, generally speaking, the high cost schools were located in what we might consider the middle income and the upper income areas.

There was one school or two schools in here, Mott and Morse which were located in the areas where the income range was $3,000to $3,999.

The mode of this distribution here by inspection looks like $5,000 a year. That is the upper income group.

The mode means the most number of times that a range appears in the distribution.

Looking at this in terms of the percent of pupils, there were one, two, three, four, five, six completely segregated

two groups was $2517.

Moving over to the last school year which we looked at on 5-13, which was the second year 1959-60, again Mr. Darrell did our computing this year, so I don't know exactly what he would get with 26 schools.

But I believe spread between the high-cost and low cost schools in '58-'59 and the low cost two schools is the same year of approximately $720.

In other words, the average expenditure in the high-cost schools was $720 higher than the average expenditure in the low cost schools.

Now again, generally speaking, the low cost schools were located in what we might consider the middle income and the upper income areas.

There was one school or two schools in here. Most and those which were located in the areas where the income range was $3,000to $3,999.

The mode of this distribution here by inspection looks like $1,450 a year. That is the upper income group.

The mode means the most number of times that a range appears in the distribution.

Looking at this in terms of the percent of pupils, there were one, two, three, four, five, six complaints expressed

schools in the upper ten cost schools.

There were all of the schools in the lower ten cost that year that were completely segregated, ranging from 70.7 -- well, not completely -- ranging from 66.7 percent black up to 100 percent black, which was Lenox Annex.

Finally, in the school year 1964-65 8.9 percent of the 80,274 black elementary school children were in the ten schools with the lowest expenditure per pupil and of the 9,445 white elementary school children 13.5 percent were in these same schools.

And not one of the bottom ten schools in any given year was located in a wealthy neighborhood.

Bunker Hill is the only school in the low group that is located in what can be called a middle income neighborhood, where the range is from $9,000 to $9,999.

This chart I think in summation generally shows a point we have been making all the time, that the poor black communities in terms of expenditure per pupil, poor and black communities, because this includes a number of poor whites, receive worse treatment expenditure ----

MR. CASHMAN: Objection, Your Honor.

THE COURT: Yes.

MR. CASHMAN: There is no ground in terms of what this

schools in the upper ten cost schools.

There were 44 of the schools in the lower ten cost that year that were completely segregated, ranging from 78.7 -- well, not completely -- ranging from 44.7 percent black up to 100 percent black, which was Lance Annex.

Finally, in the school year 1964-65 8.9 percent of the 69,174 black elementary school children were in the ten schools with the lowest expenditure per pupil and of the 9,445 white elementary school children 13.3 percent were in these same schools.

And not one of the twelve ten schools in my view year was located in a wealthy neighborhood.

Harper Hill is the only school in the ten cross that is located in what can be called a middle income neighborhood, where the range is from $9,000 to $9,999.

This chart I think is remarkably clear a - point we have been making all the time, that the poor black communities in terms of expenditure per pupil, poor and black communities, because this indicates a number of poor whites, receive worse treatment expenditure ---

MR. CASHMAN: Objection, Your Honor.

THE COURT: Yes.

MR. CASHMAN: There is no question in terms of what this

chart shows about treatment.

Now, I don't know what treatment means. Treatment could mean anything.

Now if the witness wants to refer to money values and per pupil expenditure which is displayed on that document, he is free to do so, but to interpret what is treatment from this, Your Honor, I don't think is within the realm of his testimony.

THE COURT: Mr. Hobson, suppose you use another word than treatment.

THE WITNESS: Well, I would like --

THE COURT: What were you saying that this chart shows?

THE WITNESS: I said that in summation this chart shows what we have been contending all the time, that the poor and black communities are worse off in terms of expenditure per pupil in the District of Columbia public schools for the three years which we looked at on this chart.

They are worse off in terms of money. Treatment I meant in terms of income, money only, not anything else.

That is the general position shown on this chart.

BY MR. KUNSTLER:

Q Mr. Hobson, you referred to the Hendley School and

chart shows about treatment.

Now, I don't know what treatment means. Treatment could mean anything.

Now if the witness wants to refer to money values and the pupil expenditure which is displayed on that document, he is free to do so, but to interpret what is treatment from this, very frankly, I don't think it within the scale of his testimony.

THE COURT: Mr. Brown, rather you are another word than treatment.

THE WITNESS: Well, I would like --

THE COURT: What were you saying that this chart shows?

THE WITNESS: I said that in summation this chart shows that we have been continuing all the time, that the poor and black communities are worse off in terms of expenditure per pupil in the District of Columbia public schools for the three years which we looked at on this chart.

They are worse off in terms of money. Treatment I meant in terms of income, money only, not anything else.

That is the vertical position shown on this chart.

BY MR. KUNSTLER:

Q Mr. Hudson, you referred to the Teachers School and

I ask you whether Hendley appears as one of the bottom ten in 1962-63 on your chart?

A. Yes, Hendley appears as one of the bottom ten -- wait, I am sorry.

No, Hendley does not appear as one of the bottom ten in 1962.

Q. But it does appear in 1963-64, is that correct?

A. Yes, it does.

Q. Now, Mr. Hobson, I wanted to ask you, you gave as Your source, I believe, for the information of this chart, P-5.

Was that one?

A. That is one of them.

MR. KUNSTLER: All right.

Your Honor, I have P-5 here. I would like to have it marked P-5 and offer it into evidence with this witness.

It is a District of Columbia document furnished to us by the District of Columbia, pupil membership in regular day schools on October 22, 1964 compared with October 17, 1963.

THE DEPUTY CLERK: Plaintiffs' Exhibit P-5 marked for identification.

(Document, pupil membership in regular day schools on October 22, 1964 compared with October 17, 1963 marked as Plaintiffs' Exhibit No. P-5 for identification.)

I ask you whether Hendley appears\ one of the names you in 1962-63 on your chart?

A. Yes, Hendley appears as one of the bottom ten -- wait, I am sorry.

No, Hendley does not appear as one of the bottom ten in 1962.

Q. But it does appear in 1963-64, is that correct?

A. Yes, it does.

Q. Now, Mr. Hobson, I wanted to ask you, you gave as your source, I believe, for this information of this chart, P-5.

Was that one?

A. That is one of them.

MR. KUNSTLER: All right.

Your Honor, I have P-5 here. I would like to have it marked P-5 and offer it into evidence with this witness.

It is a District of Columbia document furnished to us by the District of Columbia public secondary in regular day schools on October 25, 1964 compared with October 17, 1963.

THE DEPUTY CLERK: Plaintiffs' Exhibit P-5 marked for identification.

(Document, public secondary in regular day schools on October 25, 1964 compared with October 17, 1963 marked as Plaintiffs' Exhibit No. P-5 for identification.)

MR. CASHMAN: May I see it, Your Honor?

THE COURT: Surely.

Let counsel see it.

MR. KUNSTLER: Yes.

THE COURT: All right.

(Mr. Kunstler shows to Mr. Cashman)

BY MR. KUNSTLER:

Q Now, Mr. Hobson, you also referred to some other exhibits.

I want to show you --

MR. KUNSTLER: May I have marked, Mr. Clerk, F-8 and F-9 for identification?

THE DEPUTY CLERK: Plaintiffs' Exhibit F-8 marked for identification.

(1964-65 Expenditures per pupil for elementary schools marked as Plaintiffs' Exhibit F-8 for identification.)

Plaintiffs' Exhibit F-9 marked for identification.

(Same as F-8 only for junior and senior high schools marked as Plaintiffs' Exhibit F-9 for identification.)

BY MR. KUNSTLER:

Q I show you F-8 and F-9, which are respectively the per pupil expenditures for 1964-65 for the elementary schools, which is F-8, and the same for the junior and senior high

MR. CARMAN: May I see it, Your Honor?

THE COURT: Surely.

Let counsel see it.

MR. KUNSTLER: Yes.

THE COURT: All right.

(Mr. Kunstler shows to Mr. Carmen)

BY MR. KUNSTLER:

Q Now, Mr. Hobson, you also referred to some other exhibits.

I want to show you --

MR. KUNSTLER: May I have marked, Mr. Clerk, P-8 and P-9 for identification?

THE REPORTER CLERK: Plaintiffs' Exhibits P-8 marked for identification.

(1964-65 Expenditures per pupil for elementary schools marked as Plaintiffs' Exhibit P-8 for identification.)

Plaintiffs' Exhibit P-9 marked for identification.

(Same as P-8 only for junior and senior high schools marked as Plaintiffs' Exhibit P-9 for identification.)

BY MR. KUNSTLER:

Q I show you P-8 and P-9, which are respectively the pupil expenditures for 1964-65 for the elementary schools, which is P-8, and the same for the junior and senior high

schools, which is F-9, and ask you if you consulted those in the preparation of your chart?

A. (Examining)

No, I did not consult these documents in the preparation of my chart.

I didn't deal with the junior high schools and the expenditures per pupil that I used for the school year 1964-65 came from -- just one second.

I am sorry. Yes, I did refer to F-8.

Q. F-8?

A. Right. That is where I got these.

Q. F-9 refers to the junior and senior high schools which are not on your chart?

A. I did not use F-9.

Q. All right.

MR. KUNSTLER: Then, Your Honor, I would like to offer F-8, which is also a District of Columbia document.

BY MR. KUNSTLER:

Q. Now, while counsel is looking at F-8 and P-5, I will hand you back V-20, and ask you what that chart purports to be.

A. V-20 again is called Selected Data on District of Columbia Elementary Schools in the School Year 1962-63.

The source of this chart is Plaintiffs' Exhibit P-7,

ecuolie, which is P-7, and ask you if you consulted them in the preparation of your chart?

A. (Examining)

No, I did not consult these documents in the preparation of my chart.

I didn't deal with the junior high schools and the extracurricular pupil that I used for the second year just came from -- just one second.

I am sorry. Yes, I did refer to P-8.

Q. P-8?

A. Right. That is where I got these.

Q. P-9 refers to the junior and senior high schools which are not on your chart?

A. I did not use P-9.

Q. All right.

Mr. KUNSTLER: Now, Your Honor, I would like to offer P-8, which is also a district of Columbia document.

BY MR. KUNSTLER:

Q. Now, while counsel is looking at P-8 and P-9, I will hand you back V-10, and ask you what that chart purports to be.

A. V-10 again is called Enlarged Area in District of Columbia Elementary Schools in the School Year 1952-53.

The source of this chart is Plaintiffs' Exhibit P-7.

which deals with pupil membership, and Defendants' Exhibit 51, which is Mr. Carroll's -- the document that Mr. Carroll testified from, and the House Committee on Education and Labor hearings before the Task Force on Antipoverty in the District of Columbia in October, 1965 and January, 1966; pages 66-68 contain data on the economic level of the neighborhood. That was the data where we arrayed.

These are the same schools that Mr. Carroll listed in Defendants' Exhibit 51.

I just took them with the same array, according to high cost schools by per pupil expenditure and low cost schools, and I put in the income ranges by each of the schools based on the House Committee report.

Also I put in the number of black pupils and the number of white pupils and the percent of black pupils and the percent in the high cost schools; the number of white pupils and the number of black pupils and the percent of black pupils in the low cost schools.

The main conclusion that can be drawn on the basis of the data shown in this chart, the conclusions are that in the high cost schools the black pupils which total around approximately 6,927 represented 9.4 percent of all of the black children registered in the elementary schools in that year.

which deals with racial segregation, and Defendants' Exhibit 31, which is Mr. Carroll's -- the document that Mr. Carroll testified from, and the House Committee on Education and Labor hearing before the Task Force on Segregation in the District of Columbia in January, 1967 and February, 1967; pages 44-48 contain data on the economic level of the neighborhood.

That was the data where we arrayed.

These are the same schools that Mr. Carroll listed in Defendants' Exhibit 51.

I just took them with the same array, according to high cost schools by per pupil expenditures and low cost schools, and I put in the income figures by each of the schools based on the House Committee report.

Also I put in the number of black pupils and the number of white pupils and the percent of black pupils and the percent in the high cost schools, the number of white pupils and the number of black pupils and the percent of black pupils in the low cost schools.

The main generalizations that can be drawn on the basis of the data shown in this chart, the generalizations are that in the high cost schools are black pupils which total around approximately 6,921 representing 9.4 percent of all of the black children registered in the elementary schools in that year.

The white pupils in that same upper income cost group numbered 2,339 and represented 19.2 percent of all of the white children registered in the elementary schools in that year.

In the low cost schools,for the most part the schools in the low cost area were predominately black, I think, with one exception, of Simon, which had 31.4 percent black students in the low cost area.

MR. CASHMAN: Excuse me, Mr. Hobson.

Your Honor, with respect to Hendley listed under the low cost schools, I think there is an indication that the percentage of black pupils was 39.4?

THE WITNESS: Right.

MR. CASHMAN: Which would make that predominately white, would it not?

THE WITNESS: That's right.

MR. CASHMAN: I see.

Did I hear you correctly, Mr. Hobson?

THE WITNESS: Beg your pardon.

MR. CASHMAN: Did I hear you correctly with respect to only one school you indicated was --

THE WITNESS: If I said that, I am sorry.

MR. CASHMAN: I believe that is what you said.

THE WITNESS: I should read this, you are correct that Hendley again is a predominately white school in the low

The white pupils in that same upper income cost group numbered 3,235 and represented 58.7 percent of all of the white children registered in the elementary schools in that year.

In the low cost schools, for the most part the schools in the low rent area were predominately black, I think, with the exception, of course, which had 31.4 percent black children in the low cost area.

MR. CASHMAN: Excuse me, Mr. Hobson.

Your Honor, with respect to Hendley listed under the low cost schools, I think there is no indication that the percentage of black pupils was 39.4?

THE WITNESS: Right.

MR. CASHMAN: Which would make that predominately white, would it not?

THE WITNESS: That's right.

MR. CASHMAN: I see.

Did I hear you correctly, Mr. Hobson?

THE WITNESS: Beg your pardon.

MR. CASHMAN: Did I hear you correctly with respect to only one school you indicated was --

THE WITNESS: If I said that, I am sorry.

MR. CASHMAN: I believe that is what you said.

THE WITNESS: I should read this, you are correct that Hendley main is predominately white school in the low

cost group at 39.4.

The rest of the schools are predominately black.

In the low cost schools the black pupils which numbered 19,969 represented 27 percent of all of the black pupils registered in the elementary schools in that year.

The white pupils in the low cost schools which numbered 2,474 represented 20.3 percent of all of the white pupils registered in the elementary schools in that year.

Now, the income ranges here,again, none of the high income areas -- or none of the low cost schools are located in what we would consider the high income areas, from, oh, $10,000 to $10,999 up to $14,000 and over.

If you take the mid values of these income ranges -- that is $11,000 to $11,999, the mid value would be $11,000 and something like 499; if you take the mid values of these upper income ranges and add them up and divide by the total number of schools, you come out with an average income range for the upper bracket of $7,557.

If you do the same thing for the low income schools, you come out with an average income of $5,528, indicating that the schools in the high cost group are in communities which have on the average $2,000 more income than schools located in the low cost units.

cost group at 17.4.

The rest of the schools are predominately black.

In the low cost schools the black pupils which numbered 13,928 represented 47 percent of all of the black pupils registered in the elementary schools in that year.

The white pupils in the low cost schools which numbered 1,474 represented 26.3 percent of all of the white pupils registered in the elementary schools in that year.

Now, the income ranges here,again, none of the high income areas -- or none of the low cost schools are located in what we would consider the high income areas, from, say, $10,000 to $10,999 up to $14,000 and over.

If you take the mid values of these income ranges -- that is $12,500 to $13,499, the mid value would be $13,500 and something like 43% if you take the mid values of these upper income ranges and add them up and divide by the total number of schools, you come out with an average income range for the upper bracket of $7,557.

If you do the same thing for the low income schools, you come out with an average income of $5,434, indicating that the schools in the high cost group are in communities which have on the average $2,075 more income than schools located in the low cost units.

Again, finally, I think this chart shows that the low cost schools are located in the predominately black and poor community while the high cost schools are located -- while some of the black community can be found in the high cost schools, but all of the affluent community, children in affluent community, have access to high cost schools.

This is what this was designed to show.

BY MR. KUNSTLER:

Q Now, we have talked about Hendley.

In 1962-63, if I may just look at V-20 for a moment, the Hendley School had 39.4 percent of black pupils, is that correct?

A That is correct.

Q And it is almost at the top, is it not, of the per capita income of the low schools?

Is that correct?

A That is correct.

Q Well,how far from the top of the 26 schools does it appear?

A Well, it is -- I think it ranks -- it is about No. 21, and its median income or the income range in its community is $6,000 to $6,999.

Q When you say that it is ranked 21, what does that

Again, finally, I think this chart shows that the low cost schools are located in the predominantly black and poor community while the high cost schools are located -- while some of the black community can be found in the high cost schools, but all of the affluent community, children in affluent community, have access to high cost schools.

This is what this was designed to show.

BY MR. KUNSTLER:

Q Now, we have talked about Hendley.

In 1961-62, if I may just look at T-29 for a moment, the Hendley School had 99.4 percent of black pupils. Is that correct?

A That is correct.

Q And it is almost at the top, is it not, of the per capita income of the low schools?

Is that correct?

A That is correct.

Q Well, how far from the top of the 15 schools does it appear?

A Well, it is -- I think it ranks -- it is about no. 21, and its median income or the income range in its community is $6,000 to $6,999.

Q When you say that it is ranked 21, what does that

mean?

A. I mean it ranked 21 in terms of being -- well, it is 21 from the bottom in terms of expenditure per pupil. In other words, Hendley is one, two, three, four, five, six schools down from the top.

Q. Of the low 20 percent of the schools, correct?

A. Of the low 20 percent.

Q. Now, I want to ask you this question:

Do you have the figures for the black attendance at Hendley for the next year?

A. For 1963?

Yes, I do, for the next school year, which was 1963-64, 56.6 percent of the students were black.

Q. What about 1964-65?

A. 1964-65, 75.4 percent of the students were black.

Q. So within the two-year spread you have more than 100 percent increase, do you not, in black pupils?

A. That is correct.

Q. Now, in '62-63, as I understand it, Hendley was not in the first -- or the lowest ten schools, is that correct?

A. It was not.

Q. Now, does it appear in the lowest ten schools in '63-64 or '64-65?

mean?

A. I mean it ranked 21 in terms of being -- well, it is 21 from the bottom in terms of expenditure per pupil. In other words, Hendley is one, two, three, four, five, six schools down from the top.

Q. Of the low 20 percent of the schools, correct?

A. Of the low 20 percent.

Q. Now, I want to ask you this question:

Do you have the figures for the black attendance at Hendley for the next year?

A. For 1963?

Yes, I do, for the next school year, which was 1963-64, 56.6 percent of the students were black.

Q. What about 1964-65?

A. 1964-65, 75.4 percent of the students were black.

Q. The middle two-year period you have mean that the percent increase, do you not, in black pupils?

A. That is correct.

Q. Now, in '63-64, as I understand it, Hendley was not in the first -- or the lowest ten schools, is that correct?

A. It was not.

Q. Now, does it appear in the lowest ten schools in '63-64 or '64-65?

A. Yes, it does.

Q. What is its position in '63-64?

A. In '63-64, Hendley was six schools down from the top in the lower group.

In other words, Van Ness had the highest expenditure in the lower group of $250.

Hendley was at $238. It ranked number six in the lower group.

Q. Now, what happened to Hendley in the following year, which would be '64-65?

A. In '64-65, Hendley was 75 percent black and was third down from the top in terms of expenditure per pupil.

Q. That is still within the top ten -- the low ten?

A. Right.

Q. Of schools in the District of Columbia?

A. Still within the low ten.

Q. Now your chart only pertains to elementary schools, is that correct?

A. That is right.

MR. KUNSTLER: Your Honor, I have no further questions. I would just like to renew my offer of V-19 and V-20 as well as F-8 and P-5, and I might indicate to Your Honor that the pages which Mr. Hobson made reference to in the House hearings,

A. Yes, it does.

Q. What is its position in '63-64?

A. In '63-64, Hendley was six schools from the top in the lower group.

In other words, Van Ness had the highest expenditure in the lower group of $250.

Hendley was at $238. It ranked number six in the lower group.

Q. Now, what happened to Hendley in the following year, which would be '64-65?

A. In '64-65, Hendley was 75 percent black and was three from the top in terms of expenditure per pupil.

Q. That is still within the top ten -- the low ten?

A. Right.

Q. Of schools in the District of Columbia?

A. Still within the low ten.

Q. Mr. Cook cites only pertains to elementary schools, is that correct?

A. That is right.

Mr. [illegible]: Your Honor, I have no further questions. I would just like to renew my offer of V-18 and V-25 as well as P-6 and P-5, and I might indicate to Your Honor that the paper which Mr. Solomon made reference to in the opening testimony.

pages 66 and 67, are already in evidence I believe as our F-2.

MR. CASHMAN: One moment's indulgence, Your Honor.

MR. KUNSTLER: Your Honor, I would also like to offer F-9. This witness has not testified to it, but it is an official document and I would like to offer it to make the record complete. It is the per pupil expenditure for '64-65 for the high schools and the junior high schools.

It doesn't play any part in these charts, but just to keep the record completely up to date.

MR. CASHMAN: Your Honor, I would like to first of all say that the witness' testimony does not seem to me to be rebuttal testimony.

Here we are talking about a different selection other than Doctor Carroll made, not that that actually, Your Honor, is terribly important except as it affects whether or not this is rebuttal testimony.

It seems to me, Your Honor, we discussed in terms of Doctor Carroll's testimony the years 1962-63 and we limited it to that.

Now we have here a discussion of different schools for the years not only 1962-63, but '63-64, and '64-65.

Your Honor, it does not seem to me that this is proper rebuttal testimony.

MR. KUNSTLER: Your Honor, I would also like to offer P-9. This witness has not testified to it, but it is an official document and I would like to offer it to make the record complete.

It doesn't play any part in these charts, but just to keep the record completely up to date.

MR. CASHMAN: Your Honor, I would like to first of all say that the witness' testimony does not seem to me to be material testimony.

Here we are talking about a different selection other than Doctor Carroll's, not that that actually, Mr. Chairman, is exactly important because it affects the credibility and only material testimony.

It seems to me, Your Honor, we discussed in terms of Doctor Carroll's testimony the years 1961-1964 and we limited it to that.

Now we have been a discussion of different schools for the years not only 1962-63, but '63-64, and '64-65.

Your Honor, it does not seem to me that this is proper material testimony.

THE COURT: Do you have any objection to the exhibits?

MR. CASHMAN: Your Honor, I would like to ask the witness just a few questions, if I may.

THE COURT: All right. Go ahead.

CROSS-EXAMINATION

BY MR. CASHMAN:

Q Mr. Hobson, in terms of the top ten schools that are listed in your chart V-19?

A Right.

Q Of the top ten schools in 1962-63, how many of those schools according -- of the ten, how many of those were predominately Negro, according to your chart?

A One, two, three, four.

Q Now, in terms of the top ten elementary schools 1963-64, would you indicate for the Court how many of those schools were predominately Negro according to the chart and will you indicate if there was one that was exactly half Negro and half white?

A One, two predominately Negro and one, Grant, 50 percent, Negro.

Q Now, referring to the school year 1964-65, Mr. Hobson, would you kindly indicate, according to the chart, how many of those elementary schools, those ten elementary schools

THE COURT: Do you have any objection to the exhibits?

MR. CASHMAN: Your Honor, I would like to ask the witness just a few questions, if I may.

THE COURT: All right. Go ahead.

-----Examination-----

BY MR. CASHMAN:

Q Mr. Hobson, in terms of the top ten schools that are listed in your chart V-197

A Right.

Q Of the top ten schools in 1962-63, how many of those schools according -- of the ten, how many of those were predominately Negro, according to your chart?

A One, two, three, four.

Q Now, in terms of the top ten elementary schools 1963-64, would you indicate for the Court how many of those schools were predominately Negro according to the chart and will you indicate if their records that are mostly half Negro and half white?

A One, two predominately Negro and one, Grant, 50 percent, Negro.

Q Now, referring to the school year 1964-65, Mr. Hobson, would you similarly indicate, according to the chart, how many of these elementary schools, these ten elementary schools

were predominately Negro?

A. One, two, three, four, five, six, seven.

Q. Now, Mr. Hobson, in terms of the year 1964-65 and the elementary schools listed in the top ten, according to per pupil expenditure as you have them displayed on your chart, I would ask you to direct your attention to the income level of the school neighborhood and I would ask you how many times there appears the income level in the top ten from $3,000 to $3,999?

A. This is 1963-64?

Q. No. I am referring to '64-65.

A. 1964-65.

That appears one, two, three times.

Q. I see.

It appears, does it not, Mr. Hobson, the income level of school neighborhood runs all the way from $13,999 to $3,000 in terms of polar distribution in that chart?

A. That is correct.

Q. May I ask you this, Mr. Hobson, in terms of your chart Number V-20, which is Selected Data on District of Columbia Elementary Schools in the School Year 1962-63, can you indicate in terms of the high cost schools, according to the chart, how many of the high cost schools listed are there,

were predominantly Negro?

A One, two, three, four, five, six, seven.

Q Now, Mr. Hobson, in terms of the year 1964-65 and the elementary schools listed in the top two, according to per pupil expenditure as you have them displayed on your chart, I would ask you to direct your attention to the income level of the school neighborhood and I would ask you how many times there appears the income level in the top two from $1,001 to $3,999?

A This is 1963-64?

Q No. I am referring to '64-65.

A 1964-65.

That appears one, two, three times.

Q I see.

It appears, does it not, Mr. Hobson, in the income level of school neighborhood from all the way from $13,594 to $1,000 in terms of racial distribution in that chart?

A That is correct.

Q May I ask you this, Mr. Hobson, in terms of your chart Number V-1A, which is published into on District of Columbia Elementary Schools in the School Year 1962-63, can you indicate in terms of the high cost schools, according to the chart, how many of the high cost schools listed are there,

first of all?

A. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six.

Q. Mr. Hobson, would it be fair to say that of those high cost schools, that 16 of them, according to the chart, would be predominately Negro?

A. I can tell you in a minute.

One, high cost schools, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, correct.

Q. Now, Mr. Hobson, I am going to ask you to refer back to the other chart that is in front of you, which you prepared, and I am going to ask you, sir, to consult Footnote Number 3.

A. Footnote Number 3?

Q. Yes.

A. All right.

Q. Does that indicate that in the school year 1964-65 that 5.8 percent of all white children in the elementary schools were in the -- of all white children in the elementary schools were in the top ten schools, while 4.5 percent of all black elementary school children were in the same category?

first of all?

A One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six.

Q Mr. Hobson, would it be fair to say that of those high cost schools, that 32 of them, according to the chart, would be predominately Negro?

A I can tell you in a minute.

One, high cost schools, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen.

Q Now, Mr. Hobson, I am going to ask you to refer back to the other chart that is in front of you, which you prepared, and I am going to ask you, sir, to identify Plaintiffs Exhibit 1.

A Pentecote Number 2?

Q Yes.

A All right.

Q Does that indicate that in the school year 1964-65 that 3.7 percent of all white children in the elementary schools were in the -- of all white children in the elementary schools were in the top ten schools, while 4.5 percent of all black elementary school children were in the same category?

A. That's right.

Q. Is that correct?

A. Yes.

Q. Now, is the difference in terms of percentage there 1.3 between the white children percentage-wise?

A. Yes.

Q. And the black children?

A. 1.3.

Q. May I ask you this:

Mr. Hobson, in terms of Footnote Number 1, and as a matter of fact, all the footnotes in 1, 2, and 3, relating to the top ten schools, as you have them displayed, did you figure out a numerical figure which would be related to the percentage figures that are down there?

A. Yes, I did.

Q. Well, then --

A. Would you like to have the numerical?

Q. Yes.

If I could ask you certain questions perhaps you could indicate to me what the figures are.

In the school year 1962-63, I am referring to Footnote Number 1 now, sir, on the larger chart.

A. All right.

A That's right.

Q Is that correct?

A Yes.

Q Now, is the difference in terms of percentage there

1.3 [illegible]

A Yes.

Q And the black children?

A 1.3.

Q May I ask you this:

Mr. Hobson, in terms of Footnote Number 1, and as a matter of fact, all the footnotes in 1, 2, and 3, relating to the top ten schools, as you have them displayed, do you figure out a numerical figure which would be related to the percentage figures that are down there?

A Yes, I did.

Q Well, then --

A Would you like to have the numerical?

Q Yes.

If I could ask you certain questions perhaps you could indicate to me what the figures are.

In the school year 1962-63, I am referring to Footnote Number 1 now, sir, on the larger chart.

A All right.

Q We have a statement that 8.3 percent of all white children in the elementary schools were in the top ten schools.

What figure would be represented by 8.3 percent of all white children in that expression?

A If my calculations are correct, that would be 1,000 about 1,006 children.

Q All right.

Now in terms of the 1.7 percent of the black children enrolled in the elementary schools that year who were in the top ten schools, would you kindly indicate what numerical figure that represents?

A That represents, if my calculations are correct, 1,230 children.

Q All right.

Now in the school year 1963-64, and I am referring to Footnote Number 2, now, of the chart.

A All right.

Q About 10.9 percent of the total white elementary school enrollment was in the top ten schools.

What was your numerical figure for that, sir?

A That would be 1,185 children, approximately.

Q I see.

Now against only 1.0 percent of all black children

Q We have a statement that 8.3 percent of all white children in the elementary schools were in the top ten schools.

What figure would be represented by 8.3 percent of all white children in that expression?

A If my calculations are correct, that would be 1,000 about 1,044 minutes.

Q All right.

Now in terms of the 1.7 percent of the black children enrolled in the elementary schools that year who were in the top ten schools, could you kindly indicate what numerical figure that represents?

A That represents, if my calculations are correct, 1,525 children.

Q All right.

Now in the school year 1970-71, and I am referring to Footnote Number 2, now, of the chart.

A All right.

Q About 16.6 percent of the total white elementary school enrollment was in the top ten schools.

What was your numerical figure for that, sir?

A That would be 1,185 children, approximately.

Q I see.

Now against only 1.5 percent of all black children

enrolled in the elementary schools.

What number would 1.0 represent?

A. That would represent about 800 children, 801, something like that.

Q. Now, Mr. Hobson, with reference to Footnote Number 3 again, would you translate the 5.8 percent of all white children in the elementary schools in the top ten into a number?

A. All right.

This is the school year 1964-65?

Q. Yes, sir.

A. All right.

In the top ten into a number would be 549 children.

Q. That would be 5.8 percent of the white children?

A. That is correct.

Q. Would you indicate to the Court what 4.5 percent of all black elementary school children would be?

A. That would be 3,620.

Q. I see.

Well, I have one question.

You spoke, Mr. Hobson, about a mode.

A. A mode?

Q. Right.

THE COURT: Would you spell that?

enrolled in the elementary schools.

What number would 1.0 represent?

A. That would represent about 800 children, 801, something like that.

Q. Now, Mr. Hobson, with reference to percentage number 3 again, would you translate the 5.8 percent of all white children in the elementary schools in the top ten into a number?

A. All right.

This is the school year 1964-65?

Q. Yes, sir.

A. All right.

In the top ten into a number would be 649 children.

Q. That would be 5.8 percent of the white children?

A. That is correct.

Q. Would you indicate to the Court what percent of all black elementary school children would be?

A. That would be 3,620.

Q. I see.

Well, I have one question.

You spoke, Mr. Hobson, about a mode.

A. A mode?

Q. Right.

THE COURT: Would you spell that?

THE WITNESS: Mode, I think it is m-o-d-e.

THE COURT: All right.

BY MR. CASHMAN:

Q. Mr. Hobson, in terms of the low cost schools, what would be the mode, if you have determined it, with respect to income level of school neighborhood in the low cost schools on your long chart?

A. You would have to bear with me while I count the figures.

The mode is the most number of times a figure occurs.

Q. All right.

A. So I will have to count these.

Q. All right. Fine.

A. If I count correctly, the mode in that distribution would be $4,000.

Q. Now, in terms of the high cost schools, will you indicate what the mode is?

A. What the mode is.

If I count correctly, there are two modes here. One is -- well, there are two -- not two modes, but there are two groups of figures here which appear an equal number of times.

One I believe is $5,000 and the other is $11,000 and

THE WITNESS: Mode, I think it is m-o-d-e.

MR. [illegible] All right.

BY MR. CANNAM:

Q. Mr. Hobson, in terms of the low cost schools, what would in [illegible] if you have duplicated it, [illegible] income level of school neighborhood in the low cost schools on your long chart?

A. You would have to bear with me while I count the figures.

The mode is the most number of times a figure occurs.

Q. All right.

A. So I will have to count these.

Q. All right. Fine.

A. If I count correctly, the mode in that distribution would be $4,000.

Q. Now, in terms of the high cost schools, will you indicate what the mode is?

A. What the mode is.

If I count correctly, there are two modes here. One is — well, there are [illegible] — not [illegible], but there are two groups of figures here which appear an equal number of times.

One I believe is $5,000 and the other is $11,000 and

we choose $11,000 because that makes our point.

Q. In terms of averaging these income levels out, did you undertake to do that, Mr. Hobson?

A. This is the only -- yes, that's right.

I just took the mid values of each of these distributions -- I mean of these spreads.

Q. I see.

A. And half-way between and then added them up and divided by the total number of schools, and I came out -- do you want the figure?

Q. Yes.

A. I came out in the top ten with an average of around $7,557.

Q. Yes, sir, and in the bottom?

A. In the bottom when you do the same thing, I came out with about $5,538.

Q. What is the difference between those two figures? Can you calculate that for me while you are sitting there?

A. I think about $2,000 difference.

MR. CASHMAN: Your Honor, I have no further questions of the witness.

THE COURT: Is there anything further?

MR. KUNSTLER: No, Your Honor, I have nothing further

we choose $11,000 because that makes our point.

Q In lieu of averaging along income levels, did you undertake to do that, Mr. Hobson?

A This is the only -- yes, that's right.

I just took the mid values of each of these distributions -- I mean of these spreads.

Q I see.

A And halfway between and then added them up and divided by the total number in spectrum. But I came out -- do you want the figure?

Q Yes.

A I came out in the top ten with an average of around $7,551.

Q Yes, sir, and in the bottom?

A In the bottom when you do the same thing, I came out with about $5,538.

Q What is the difference between these two figures? Can you calculate that in as little you are sitting there?

A I think about $1,988 difference.

MR. CHERNAN: Your Honor, I have no further questions of the witness.

THE COURT: Is there anything further?

MR. [illegible]: No, Your Honor, I have nothing further.

of the witness.

THE COURT: Well, the Court's ruling is that these exhibits are sufficiently connected with Doctor Carroll's testimony to be recognizable and qualify as rebuttal.

Now, I take it, Mr. Cashman, that your objection relates not only to V-19 and V-20, but also to F-8 and P-5?

MR. CASHMAN: Well, Your Honor, with respect to P-5 and F-8 and F-9, they are official documents of the District of Columbia, so I have no objection to them in terms of either authenticity or accuracy.

My only objection runs to their being considered in terms of rebuttal.

Now I think counsel did make the distinction that he was putting F-9 in, not in connection with this testimony, because it relates to junior high schools and high schools, whereas the testimony related merely to elementary schools.

But, Your Honor, therefore I have no objection to F-9.

But in terms of F-8, it is restricted merely to the fact that it constitutes rebuttal testimony and the Court has already ruled in that regard.

THE COURT: All right.

Let F-9 be admitted without objection and the rebuttal objection will show as to F-8, P-5, V-19 and V-20.

of the witness.

THE COURT: Well, the Court's ruling is that these exhibits are sufficiently connected with Detroit Carroll's testimony to be admissible and qualify as rebuttal.

Now, I take it, Mr. Cashman, that your objection relates now only to P-12 and P-22, but also to P-8 and P-27

MR. CASHMAN: Well, Your Honor, with respect to P-5 and P-4 and P-6, they are official documents of the District of Columbia, so I have no objection to them in terms of either authenticity or accuracy.

My only objection was to their being considered in terms of rebuttal.

Now I think counsel did make the distinction that he was putting P-8 in, not in connection with this testimony, because it relates to junior high schools and high schools, whereas the testimony related merely to elementary schools.

But, Your Honor, therefore I have no objection to P-9.

But in terms of P-8, it is restricted merely to the testimony of constitutes rebuttal testimony and the Court has already ruled in that regard.

THE COURT: All right.

Let P-9 be admitted without objection and the rebuttal objection will stand as to P-8, P-5, P-12 and P-22.

Now, Mr. Hobson, when you used the term predominately Negro and predominately white, in your testimony just then, did you mean more than 50 percent?

THE WITNESS: I meant more than 50 percent.

THE COURT: All right, sir.

Thank you very much.

Any further questions?

That is all, Mr. Hobson.

(Whereupon the witness left the stand.)

(Plaintiffs' Exhibit F-9 admitted in evidence.)

(Plaintiffs' Exhibits F-8, P-5, V-19 and V-20, admitted in evidence with a rebuttal objection.)

MR. KUNSTLER: Your Honor, before I call our next witness, who is outside, I would like to offer into evidence Tables 22 of the Bureau of the Census Report called Governmental Finances in 1964-65, GF No. 6, which is an official publication of the Bureau of the Census, and Table 22 refers to the per capita amounts of selected items of state and local government finances.

We are calling particular attention, of course, to the figures on education. The District of Columbia is listed along with the states, together with a United States average

Now, Mr. Hobson, when you used the term predominately Negro and predominately white, in your testimony just then, did you mean more than 50 percent?

THE WITNESS: I meant more than 50 percent.

THE COURT: All right, sir.

Thank you very much.

Any further questions?

That is all, Mr. Hobson.

(Whereupon the witness left the stand.)

(Plaintiffs' Exhibit P-9 admitted in evidence.)

(Plaintiffs' Exhibits P-8, P-9, V-19 and V-20, admitted in evidence with a rebuttal objection.)

MR. NUNSTIEP: Your Honor, before I call our next witness, who is outside, I would like to offer into evidence Tables 32 of the Bureau of the Census Report called Governmental Finances in 1964-65, or so. It, which is an official publication of the Bureau of the Census, and Table 32 refers to the per capita amounts of selected items of state and local governmental finances.

We are calling particular attention, of course, to the figures in addition. The District of Columbia is listed along with the states, together with a United States average

and a median state average as to the amounts spent for education broken down into total, capital outlay, other than capital outlay, and for local schools.

The purpose of the offer is to indicate the ranking of the District of Columbia, which I believe is 48 on the list, as compared to the --

MR. CASHMAN: Now, Your Honor, before he reads it, I would think that I would at least be entitled to see it.

MR. KUNSTLER: I am not reading it.

MR. CASHMAN: I believe that you were reading from it, sir.

THE COURT: You may see it, Mr. Cashman. Of course, Mr. Kunstler will not make any statements with reference to what that document shows until you have an opportunity to study it.

MR. CASHMAN: Your Honor, may I have an opportunity to study it?

MR. KUNSTLER: May we have it marked, first, Your Honor?

THE COURT: Have it marked.

MR. KUNSTLER: A-37, Your Honor.

THE DEPUTY CLERK: Plaintiffs' Exhibit A-37 marked for identification.

(Bureau of the Census Report marked as Plaintiffs Exhibit No. A-37 for identification.)

and a media with integrity as to the moneys spent for educational improvements, capital outlay, other than regular outlay, and for local schools.

The purpose of the offer is to indicate the validity of the District of Columbia, which I believe is as low the line, as compared to the --

MR. CHERMAN: Now, Your Honor, before he reads it, I would think that I would at least be entitled to see it.

MR. KUNSTLER: I am not reading it.

MR. CARMEAN: I believe that you were reading from it, sir.

THE COURT: You may see it, Mr. Carmean. Of course, Mr. Kunstler will not make any statements with reference to what that document shows until you have an opportunity to study it.

MR. CARMEAN: Your Honor, may I have an opportunity to study it?

MR. KUNSTLER: May we have it marked, first, Your Honor?

THE COURT: Have it marked.

MR. KUNSTLER: A-37, Your Honor.

THE DEPUTY CLERK: Plaintiffs' Exhibit A-37 marked for identification.

(Bureau of the Census Report marked as Plaintiffs Exhibit No. A-37 for identification.)

MR. KUNSTLER: I would also like to know, Your Honor, if the defendant is going to offer into evidence the various textbooks which were testified to by -- I believe it was Mr. Nathaniel Dixon.

MR. REDMON: They were offered in evidence already, Your Honor.

THE DEPUTY CLERK: They are in evidence.

MR. KUNSTLER: Oh, they are in evidence?

MR. CASHMAN: My understanding is that they are in, yes.

MR. KUNSTLER: Then I withdraw the question.

Your Honor, would it be proper now to ask you for a five-minute recess? We have a witness waiting outside.

THE COURT: We can take a recess.

Do you have something in your hand you want to offer?

MR. KUNSTLER: No, Your Honor.

THE COURT: We will take a five-minute recess.

itz fls. (Whereupon the Court took a short recess.)

MR. KUNSTLER: I would also like to know, Your Honor, if the defendant is going to offer into evidence the various bookbooks which errelevantlist to by -- I believe it was Mr. Nathaniel Dixon.

MR. EDMONS: They were offered in evidence already, Your Honor.

THE DEPUTY CLERK: They are in evidence.

MR. KUNSTLER: Oh, they are in evidence?

MR. CASHMAN: My understanding is that they are in, yes.

MR. KUNSTLER: Then I withdraw the question.

Will Judge, would it be proper now to ask you for a five-minute recess? We have a witness waiting outside.

THE COURT: We can take a recess.

Do you have something in your hand you want to offer?

MR. KUNSTLER: No, Your Honor.

THE COURT: We will take a five-minute recess.

(Recess taken and back on the record.)

AFTER RECESS

MR. KUNSTLER: Your Honor, we will call as our next witness Caryl Conner. I might indicate, Your Honor, that this is not a rebuttal witness. We left in the record, if Your Honor will recall, an opening to call her when I indicated there had been just issued a report with reference to the number of failures in the Armed Forces among Negroes from the District of Columbia taking the Armed Forces AFQT, the Armed Forces intelligence test; and the record will bear out that we indicated that we would hold the record open, and Your Honor gave us permission to hold the record open for Mrs. Conner who was not available then.

Thereupon,

CARYL CONNER

was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUNSTLER:

Q Mrs.Conner, will you state for the record by whom you are employed?

A By the Department of Health, Education and Welfare in the Office of Education.

Q And what is your position?

AFTER RECESS

MR. KUNSTLER: Your Honor, we will call as our next witness Cheryl Bonner. I might indicate, Your Honor, that this is not a rebuttal witness. So left to the jury, if Your Honor will recall, we reserving it until the time I indicated there had been just issued a report with reference to the number of Pakistani in the United States among Pakistani the Ministry of Education dating the Armed Forces AFQT. The Armed Forces Qualifying Test; and the report will bear out that we indicated that to which held the record open, and Your Honor gave us permission to hold the record open the Mr. Bonner who was not available then.

THE COURT:

CHERYL BONNER

was called as a witness for the plaintiffs and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUNSTLER:

Q Mrs.Bonner, will you state for the record by whom you are employed?

A By the Department of Health, Education and Welfare in the Office of Education.

Q And what is your position?

A I am the managing editor of the magazine, the American Education.

Q Would you give your name for the record and spell both your first and last name?

A My name is Caryl, C-a-r-y-l, Conner, C-o-n-n-e-r.

MR. KUNSTLER: May I have this marked A-34a.

THE DEPUTY CLERK: Plaintiffs' Exhibit A-34a marked for identification.

(Copy of American Education magazine, October 1966, was marked Plaintiffs' Exhibit A-34a for Identification.)

BY MR. KUNSTLER:

Q Now, you mentioned the magazine, American Education, and I ask you, is this document A-34a, a copy of the American Education?

A Yes, it is.

Q And what is American Education?

A It is the official journal of the Office of Education, the only regularly published periodical that represents the Office.

Q And how often does it come out?

A Ten times a year.

Q Now, I have shown you the issue for what month?

A I am the managing editor of the magazine, the American Education.

Q Would you spell your name for the record and will both your first and last name?

A My name is Gary, G-a-r-y-A, Kumme, K-u-m-m-e.

MR. KUMMELER: May I have this marked 4-Ja.

The reporter stated: Kummeller's Exhibit 4-Ja marked for identification.

(Copy of American Education magazine, October 1960, was marked Kummeller's Exhibit 4-Ja for identification.)

BY MR. KUMMELER:

Q Now, you mentioned the magazine, American Education, and I ask you, is this document 4-Ja, a copy of the American Education?

A Yes, it is.

Q And what is American Education?

A It is the official journal of the Office of Education, the only regularly published periodical that represents the office.

Q And how often does it come out?

A Ten times a year.

Q Now, I have shown you the issue for what month?

A October.

Q Of what year?

A 1966.

Q And I call your attention to an article called, "How Good Are Our Schools?" and ask you whether you are one of the authors of that article.

A Yes, I am.

Q And who is the other author?

A Richard de Neufville.

Q And who is Richard de Neufville?

A Richard de Neufville was the White House fellow attached to Secretary McNamara last year. He was previously a national merit scholarship winner and National Science Foundation scholarship holder for four years, both scholarships four years. He is presently on the faculty at MIT.

Q In what capacity?

A As an assistant professor.

Q In what field?

A Civil engineering.

Q Now, Mrs. Conner, you are not an expert in education?

A No, sir.

A Yes.

Q Of what year?

A 1966.

Q And I call your attention to an article called, "How Good Are Our Schools?" and ask you whether you are one of the authors of that article.

A Yes, I am.

Q And who is the other author?

A Richard de Neufville.

Q And who is Richard de Neufville?

A Richard de Neufville was the White House fellow attached to Secretary McNamara last year. He was previously a national merit scholarship winner and Rhodes Scholarship recipient, graduate from Yale, both undergraduate four years. He is presently on the faculty at MIT.

Q In what capacity?

A As an assistant professor.

Q In what field?

A Civil engineering.

Q Now, Mrs. Conner, you are not an expert in education?

A No, sir.

Q And I want to call your attention to the chart which appears, I believe, is it page 9?

A I don't know which chart you are referring to.

Q On page 9 of the October 1966 issue of American Education, and I am referring only to that chart which is on the extreme right-hand side of the page, which is headed: "Armed Forces mental test failures, 18-year-olds: June 1964-December 1965 study (by percent).

Now that is a chart illustrating what?

A The failure rate on State by State basis with white and Negro breakdowns of an eighteen month study of early examination of eighteen year olds conducted by the Department of Defense as a result of the Manpower Conservation Commission's recommendation to the White House.

Q I wanted to ask you, a failure rate on what?

A On the Armed Forced Qualification Test.

Q Can you explain to the Court just what the Armed Forces Qualification Test is?

A It is an examination administered by The Surgeon General's Office of the Department of the Army, and it is taken by everyone entering or being considered for entry into the Armed Services, all branches of the Armed Services.

Q And I want to call your attention to the chart which appears, I believe, is it page 9?

A I don't know which chart you are referring to.

Q On page 9 of the October 1966 issue of American Education, did I be referring only to that chart which is on the extreme right-hand side of the page, which is entitled: "Armed Forces mental test failures, 18-year-olds: June 1964-December 1965 with 1966 projections".

Now what is a chart illustrating what?

A The failure rate on State by State basis with white and Negro breakdowns of an eighteen month period of early examination of eighteen year olds conducted by the Department of Defense as a result of the Manpower Mobilization Commission's recommendation to the White House.

Q I wanted to ask you, a failure rate on what?

A On the Armed Forces Qualification Test.

Q Can you explain to the Court just what the Armed Forces Qualification Test is?

A It is an examination administered by the Surgeon General's office of the Department of the Army, and it is taken by everyone entering or being considered for entry into the Armed Services, all members of the Armed Services.

Q Now, Mrs. Conner, where did the information come from?

A In that chart?

Q With reference to this chart.

A From the Office of The Surgeon General of the Department of the Army.

Q And would you tell the Court what you received, what the data consisted of that you received from the Department of Defense?

A The raw data was a worksheet with penciled in and inked in figures on legal size stationery with several columns, and it had exactly identical information that is published in that particular chart.

Q In other words, you had nothing to do with assembling the data yourself, you received it from the Department of Defense?

A I received it from the Department of Defense.

MR. KUNSTLER: May I have marked for identification A-38.

THE DEPUTY CLERK: Plaintiff's Exhibit No. A-38 marked for identification.

(Data concerning Armed Forces mental test failures was marked Plaintiffs' Exhibit No. A-38 for Identification.)

Q Well, Mr. Sussman, where did the information come from?

A In that chart?

Q With reference to this chart.

A From the Office of The Surgeon General of the Department of the Army.

Q And would you tell the Court what you received, what the data available if that you received from the Department of Defense?

A The raw data was a voluminous file pertaining to and image in figures on legal size accidents with weapons systems, and it was exactly identical information that is published in that particular chart.

Q In other words, you had nothing to do with assembling the data yourself, you received it from the Department of Defense?

A I received it from the Department of Defense.

MR. [illegible]: May I have marked for identification A-38.

THE DEPUTY CLERK: Plaintiff's Exhibit No. A-38 marked for identification.

(Data concerning Armed Forces medical test failures was marked Plaintiff's Exhibit No. A-38 for identification.)

MR. KUNSTLER: Thank you.

BY MR. KUNSTLER:

Q Mrs. Conner, I show you A-38 for Identification and ask you if you can indicate to the Court what that document is.

A This is the document received from the Department of Defense which has the white-Negro breakdown, on the eighteen month study of 18-year olds.

Q Does that correspond to the chart on page 9?

A It does, and the only difference is in some cases there are stars on the chart now where the total number of people examined provided a sample so small that we felt the percentage figure was meaningless.

Q Now, with reference to the chart which appears on page 9 to which we have already made reference to, would you indicate, and I might say that I am just asking now for mathematical ranking, no opinions whatsoever, in percentages of Negro failures on the AFQT, would you indicate what the, say, ten jurisdictions which have the highest numbers of failures are?

MR. CASHMAN: Your Honor, I have an objection to the question on the grounds that it is not relevant.

THE COURT: The objection is overruled.

MR. [illegible]: Thank you.

BY MR. KUNSTLER:

Q Mrs. Conner, I show you A-38 for identification and ask you if you can indicate to the Court what that document is.

A This is the document involving Dress Rehearsal of Inferno within the Walls-Depth Operations, an eighteen month study of 18-year olds.

Q Does that correspond to the chart on page 97

A It does, and the only difference is in some cases there are where in the chart and there the total number of people exceeded previous a people so small that we felt the percentage figure was meaningless.

Q Now, with reference to the chart which appears on page 7 to which we have already made reference to, which you indicate, sir I object are that I am just reading from for mathematical reading, no opinions whatsoever, in percentages of Negro failures in the ROTC, would you indicate what the, say, the institutions which have the highest numbers of failures are?

MR. CASHMAN: Your Honor, I have an objection to the question on the grounds that it is not relevant.

THE COURT: The objection is overruled.

THE WITNESS: By jurisdictions--

BY MR. KUNSTLER:

Q I mean by States or the District of Columbia. That is what I am referring to as a jurisdiction.

A Did you ask me for the highest failure rate among Negroes or the total failure rate?

Q I am asking you for the highest failure rate among Negroes.

A The District of Columbia, South Carolina, Mississippi, North Carolina, Tennessee, Louisiana, Virginia, Alabama, Georgia, Arkansas, and Florida.

Q Now, I notice in looking at the chart that Nevada and Arizona list 68.2 for Nevada and Arizona 68.1. Would you include those among the highest percentages?

MR. CASHMAN: Your Honor, I understood that this witness was going to be asked what figures were displayed on a particular tabular representation, no opinions, no interpretations.

Now we have already learned that this table comes from the Office of The Surgeon General of the Army and not from the Office of Education.

Now whether or not she would include the figure in those above the national average on that is of really no

THE WITNESS: By jurisdictions--

BY MR. KONTRAGEN:

Q I mean by States or the District of Columbia. That is what I am referring to as a jurisdiction.

A Did you ask me for the highest failure rate among Negroes or the total failure rate?

Q I am asking you for the highest failure rate among Negroes.

A The District of Columbia, South Carolina, Mississippi, North Carolina, Tennessee, Louisiana, Virginia, Alabama, Georgia, Arkansas, and Florida.

Q Now, I notice in looking at the chart that Nevada and Arizona list 50.2 for Nevada and Arizona 48.7. Would you include those among the highest percentages?

MR. GASHMAN: Your Honor, I understood that this witness was going to be asked what figures were analogous in a particular jurisdiction representative, no question, in interpretation.

You we have already learned that this table came from the office of the Surgeon General of the Army and not from the Office of Education.

Now whether or not she would include the figure in those places the national average or what is of usually or

moment and is beyond any qualification that has been set up for her at this particular time.

MR. KUNSTLER: I will withdraw the question, Your Honor.

THE COURT: All right, sir.

MR. KUNSTLER: Can I have this marked A-39?

THE DEPUTY CLERK: Plaintiffs' Exhibit A-39 marked for identification.

(Document relating to achievement by Region -- Negro, was marked Plaintiffs' Exhibit A-39 for Identification.)

BY MR. KUNSTLER:

Q Mrs. Conner, I show you A-39 for Identification and ask you whether you can identify this document.

A Yes, sir.

Q And what is that document?

A It is a document which shows the size of the sample that represents the percentage listed in this column, the total number of Negroes who make up this percentage.

Q And that is for every State and the District of Columbia?

A That is right. Excuse me. I don't think Hawaii and Alaska.

Q With the exception of Hawaii and Alaska?

moment and is having any qualification that she may set up for her at this particular time.

MR. KUNSTLER: I will withdraw the question, Your Honor.

THE COURT: All right, sir.

MR. KUNSTLER: Can I have this marked A-39?

THE DEPUTY CLERK: Plaintiffs' Exhibit A-39 marked for identification.

(Document relating to achievement by Negro -- Negro, was marked Plaintiffs' Exhibit A-39 for identification.)

BY MR. KUNSTLER:

Q Mrs. Conner, I show you A-39 for identification and can you whether you can identify this document.

A Yes, sir.

Q And what is that document?

A It is a document which shows the size of the single that represents the percentage filled in this column, the total number of degrees and made by this department.

Q And that is for every State and the District of Columbia?

A That is right. Excuse me. I don't think Hawaii and Alaska.

Q With the exception of Hawaii and Alaska?

A Yes.

Q Where did you receive these figures from?

A These figures were developed from Defense Department data in the Office of Education.

Q Did all the raw data come from the Department of Defense?

A All the raw data came from the Department of Defense.

Q Now after you had created the chart from the Defense Department figures which appears on page 9 of our A-34a -- well, let me withdraw that for a moment and ask you this.

When the data came in and the data was assembled, was it checked in your office?

A Yes, sir.

Q And can you indicate how the checking was done, mathematical checking now?

A Well, I didn't do mathematical checking. Alexander Mood's office did that for us.

Q Is that Dr. Mood in the Office of Education?

A Yes, it is.

Q And was the information submitted by you to him for checking?

A Yes.

Q Where did you receive these figures from?

A These figures were developed from Defense Department data in the Office of Education.

Q Did all the raw data come from the Department of Defense?

A All the raw data came from the Department of Defense.

Q Now after you had created the chart from the Defense Department figures which appear on page 3 of our A-324 -- well, let me withdraw that for a moment and ask you this:

When the data came in and the data was assembled, was it checked in your office?

A Yes, sir.

Q And can you indicate how the checking was done, mathematical checking?

A Well, I didn't do mathematical checking. Alexander Mood's office did that for us.

Q Is that Dr. Mood in the Office of Education?

A Yes, it is.

Q And was the information submitted by you to him for checking?

A That is right.

Q Now, did you also have it verified by the Department of Defense?

A Yes, sir.

Q Or the Department of the Army, rather?

A Yes, I did.

MR. KUNSTLER: Can we have this marked A-40?

THE DEPUTY CLERK: Plaintiffs' Exhibit A-40 marked for identification.

(Letter of 9/9/66 from Col. Lee to Caryl Conner plus galley proofs was marked Plaintiffs' Exhibit A-40 for Identification.)

BY MR. KUNSTLER:

Q Would you indicate what you did with the data once you had it assembled as far as the Department of the Army is concerned?

A I sent it to the Office of The Surgeon General and a man named Colonel Lee who was liaison person in the Department of the Army, Deputy Bureau of Personnel or some such office. I sent them galley proofs and I sent the original manuscript for galley proofs; and I asked for their careful reading and their indication as to accuracy or inaccuracy of the data contained in the article that was

A That is right.

Q Now, did you also have it verified by the Department of Defense?

A Yes, sir.

Q Or the Department of the Army, rather?

A Yes, I did.

MR. KUNSTLER: Can we have this marked A-40?

THE DEPUTY CLERK: Plaintiff's Exhibit A-40 marked for identification.

(Letter of 9/9/66 from Col. Lee to Gerry Conner plus galley proofs was marked Plaintiff's Exhibit A-40 for identification.)

BY MR. KUNSTLER:

Q Would you indicate what you did with the data once you had it assembled or for my time purposes if the Army is concerned?

A I sent it to the office of the Surgeon General and a man named Colonel Lee who was liaison person in the Department of the Army, Deputy Bureau of Personnel or some such office. I sent them galley proofs and I sent the original manuscript for galley proofs; and I asked for their careful reading and their indication as to accuracy or inaccuracy of the data contained in the article that was

drawn from anything they had given us.

They found some errors. The errors were changed, and the final version as it appears in print was approved by them for accuracy. They so informed me by letter.

Q I show you A-40 for Identification and ask you if that is the letter which you received from Colonel Lee.

A Yes, it is.

MR. KUNSTLER: Your Honor, I have no further questions.

I offer into evidence the documents marked for identification only for the purpose of the mathematical tables contained in A-34a and not for any editorial comment that appears in that article.

MR. CASHMAN: Your Honor, do I understand that this is for all the tables that are in A-34a or is it just for one table?

MR. KUNSTLER: No, Your Honor. We are limiting it to the one table on the failure rate of Negroes on the AFQT.

THE COURT: And that appears where?

MR. KUNSTLER: It appears on page 9. It is the extreme right-hand chart on page 9.

THE COURT: All right.

MR. CASHMAN: If Your Honor pleases, I am going

drawn from anything they had given us.

They found some errors. The errors were changed, and the final version as it appears in print was approved by them for accuracy. They so informed us by letter.

Q I show you A-40 for identification and ask you if that is the letter which you received from Colonel Lee.

A Yes, it is.

MR. KUNSTLER: Your Honor, I have no further questions.

I offer into evidence the Government exhibit for identification only for the purpose of the mathematical tables contained in A-39a and not for any editorial comment that appears in that article.

MR. GAGNEBIN: Your Honor, do I understand that this is for all the tables that are in A-39a or is it just for one table?

MR. KUNSTLER: No, Your Honor. We are limiting it to the one table in the military rule of Reynolds on the AMQT.

THE COURT: And that appears where?

MR. KUNSTLER: It appears on page 9. It is the extreme right-hand chart on page 9.

THE COURT: All right.

MR. GAGNEBIN: If Your Honor please, I am going

to object to the table, and I would like to have the benefit of seeing what the other items marked are with respect to counsel's offer.

THE COURT: I don't know what you are offering. You tell me what you are offering.

MR. KUNSTLER: I am offering the letter. I might as well leave the galley proofs. That is what they saw. So we will leave it all in.

MR. CASHMAN: Your Honor, at this time before I can comment intelligently on what has been given tome which are documents of some volume, Your Honor, I am going to have to have an opportunity to look at them.

I would make this initial objection, however, Your Honor. I indicated at the beginning that I thought the testimony was irrelevant. There has been no showing, Your Honor, of what relationship the Armed Forces mental test has with relationship to any issue in this lawsuit.

Now, truly, the Armed Forces Qualification Test certainly is given. I have no doubt about that. It is very widespread. I have no doubt about that. But if its purpose is to serve Army qualification purposes, it seems to me as if there has to be established one way or the other of

to object to the issue, and I would like to have the benefit of seeing what the other items marked are only because it seems it's offer.

THE COURT: I don't know what you are offering. You tell me what you are offering.

MR. KUNSTLER: I am offering the letter. I might as well leave the guilty plea. That is what they want. So we will leave it all in.

MR. CARMAN: Your Honor, at this time before I was present intelligently on what has been given them which are documents of some value, Your Honor, I am going to have to have an opportunity to look at them.

I would make this initial objection, however, Your Honor. I indicated at the beginning that I thought the testimony was irrelevant. There has been no showing Your Honor of what relationship the Grand Jurors minutes test has with relationship to any issue in this lawsuit.

Now, truly, the Grand Jurors qualification has certainly is given. I have no doubt about that. It is very widespread. I have no doubt about that. But if its purpose is to serve some qualification purposes, it seems to me at there has to be relationship one way or the other of

whether or not it is a fair criterion to criticize the performance of the school system about which is what we are concerned with here.

Now it seems to me to go to the quite narrow purpose of determining for Army purposes or Armed Forces purposes whether or not a person is qualified by their criteria, taking their particular examination, to serve, at least give the mental cutoff for that purpose. Its relationship to this lawsuit, Your Honor, I am afraid I don't immediately see.

THE COURT: Mrs. Conner, is it disclosed in any of the documents that have been offered just what this test is that these statistics relate to?

THE WITNESS: The documents that have been offered include the magazine, but I think you are only referring to the chart. The magazine article itself does explain the purpose of the Armed Forces Qualification Test and also the Army's statement of its educational equivalency level.

THE COURT: I see.

Is the magazine article offered in evidence, too?

MR. KUNSTLER: I am offering the article, too, Your Honor, but only as it relates to that particular chart.

whether or not it is a fair criterion to criticize the performance of the second grade which is said to be concerned with here.

Now it seems to me to go to the quite narrow point of determining for Army purposes or Armed Forces purposes whether or not a person is qualified by their criteria, taking their particular examination, to serve, at least give the mental cutoff for that purpose. Its relationship to this lawsuit, Your Honor, I am afraid I don't immediately see.

THE COURT: Mrs. Conner, is it disclosed in any of the documents that have been offered just what this test is that these statistics relate to?

THE WITNESS: The documents that have been offered include the magazine, but I think you are only referring to the chart. The magazine article itself does explain the purpose of the Armed Forces Qualification Test and also the Army's standard of its educational requirement level.

THE COURT: I see.

Is the magazine article offered in evidence, too?

MR. CONSTANT: I am offering the article, too, Your Honor, but only as it relates to that particular chart.

I might indicate, Your Honor, I would offer in evidence what Mrs. Conner has brought with her, the Army's description, I believe, of the AFQT; and if I could have that, I will offer it.

THE WITNESS: I think I left it back at that bench.

THE COURT: Would you step down a minute and get it, Mrs. Conner.

MR. CASHMAN: Your Honor, I am confused about what is being offered now. My understanding was from both representations of counsel and upon my questioning that the documents marked as plaintiffs' exhibits were being offered and the last table over here on the right-hand side of page 9. Now I understand the offer includes the entire article. Now, is that the present status?

MR. KUNSTLER: Your Honor, what I said was the article as it relates to the chart, the Armed Forces mental test failures for eighteen-year olds. The article discusses that particular chart. It discusses other charts, too, which go into annual salaries of public school teachers and so on, which I was not offering in. I am confining it to the failure rate on the test itself.

THE COURT: Can you point to the specific part

I might indicate, Your Honor, I would offer in evidence what Mrs. Cooper has brought with her, the study's summaries, I believe, of the AMET; and if I could have that, I will offer it.

THE WITNESS: I think I left it back at that hotel.

THE COURT: Would you step down a minute and get it, Mrs. Cooper.

MR. GLEASON: Your Honor, I am somewhat about at a loss where it being offered now. My understanding was from the preliminarities of counsel and upon my questioning that the documents marked as plaintiff's exhibits were being offered and the last table over here on the right-hand side of page 3. Now I understand the offer includes the entire article. Now, is that the present posture?

MR. KUNSTLER: Your Honor, what I said was the article as it appears in the study, the Armed Forces Medical Test Patterns for Airplane-Pilot Size. The article discusses that particular chart. It discusses other charts, too, which go into various calculus of public school teachers and so on, which I am not offering in. I am restricting it to the failure rate on the test itself.

THE COURT: Can you point to the specific part

of the article which discusses the point you have in mind?

MR. KUNSTLER: Your Honor, what I can do is have those parts marked by the witness when she finishes her testimony and turn it over to counsel.

THE COURT: How long is the article?

MR. KUNSTLER: The article runs about five or six pages, Your Honor. It runs from page 2 through page 9, seven pages, the last two pages being charts. The seventh page has some sample test questions. There is some editorial comment in the article which I was trying to stay away from, because she is not an expert. I was just trying to keep her in the field of mathematical computations. And I could have her mark those portions of the article which indicate only the mathematical computations.

I was not offering her to buttress any conclusions in the article; because she is concededly not an expert in education or test taking and the like.

THE COURT: To make certain what counsel's objection is, I think it would be helpful to have the witness mark if she can the relevant parts of the article so that your offer can be limited to that part which she marks. I believe that is your intention.

MR. KUNSTLER: That is right. I would be

of the article which discusses the point you seem to which

MR. KUNSTLER: Your Honor, what I can do is have those parts marked by the witness when she finishes her testimony and turn it over to counsel.

THE COURT: How long is the article?

MR. KUNSTLER: The article runs about five or six pages, Your Honor. It runs from page 2 through page 9, seven pages, the last two pages being charts. The seventh page has more simple test questions. There is some editorial comment in the article which I was trying to stay away from, because she is not an expert. I was just trying to keep her in the field of mathematical computations. And I could have her mark those portions of the article which indicate only the mathematical computations.

I am not attempting her to interpret any conclusions in the article, because she is essentially not an expert in education or test taking and the like.

THE COURT: To make certain what counsel's objection is, I think it would be helpful to have the witness mark if she can the relevant parts of the article so that your office can be alerted to that part Mr. Kunstler.

I believe that is your intention.

MR. KUNSTLER: That is right. I would be

perfectly willing to do that.

MR. CASHMAN: If Your Honor pleases, I think that this action that is now being taken is not to clarify my objection. My objection was on the grounds that it is not relevant. I think that this action that is now being taken between counsel and the witness is action to clarify what he is offering, not my objection, if Your Honor pleases.

THE COURT: Yes, I understand.

All right. Now, before we get to marking the magazine article, would you now direct your attention, Mrs. Conner, to the Army test. You say you have a description of the Army test before you now?

THE WITNESS: Yes, sir.

THE COURT: And this is an official Army document?

THE WITNESS: I have two different things. One is an official Army document describing the test. And I also have a publication called Health of the Army, which is an annual publication of the Department of Defense, which discusses the Army's point of view as far as the AFQT is concerned, what they think goes into success or failure of the AFQT.

THE COURT: Well, the document that you say

perfectly willing to do that.

MR. CASHMAN: If Your Honor please, I think that this section that is now being taken is not to clarify my objection. My objection was on the ground that it is not relevant. I rules that this section that is now being taken between counsel and the witness is calling to clarify what is objecting, not my objection, if Your Honor please.

THE COURT: Yes, I understand.

All right. Now, before we get to marking the magazine article, could you can direct your attention, Mr. Decker, to the Army Navy. Yes, may you have a description of the Army Navy Set before you now?

THE WITNESS: Yes, sir.

THE COURT: And this is an official Army document?

THE WITNESS: I have two different things. One is an official Army document describing the Set. And I also have a publication called Health of the Army, which is an annual publication of the Department of Defense, which discusses the Army's point of view as far as the ARGY is concerned, what they think goes into success or failure of the ARGY.

THE COURT: Well, you document that you may

describes the AFQT test, do you have it there?

THE WITNESS: Yes.

MR. KUNSTLER: I will have that marked, Your Honor.

I think that would be, Mr. Clerk, 41.

THE DEPUTY CLERK: Plaintiffs' Exhibit A-41 marked for identification.

(Copy of Armed Forces Qualification Test (AFQT) for pamphlet was marked Plaintiffs' Exhibit A-41 for Identification.)

THE COURT: Now, may I see it, please. What I am trying to learn, Mrs. Conner, is just what the test is. Is it an intelligence test; is it an achievement test; what kind of a test is it?

MR. CASHMAN: If Your Honor pleases, before the witness responds, I do not believe the witness is qualified to answer what kind of a test it is. That is why counsel so carefully skirted anything other than the mere recitation of facts in the case.

Your Honor, there has been no showing that she can judge what a test is designed to measure.

MR. KUNSTLER: Your Honor, if I could question her on this.

describes the AFQT test, do you have it there?

THE WITNESS: Yes.

MR. KUNSTLER: I will have that marked, Your Honor.

I think that would be, Mr. Clerk, 41.

THE DEPUTY CLERK: Plaintiffs' Exhibit A-41 marked for identification.

(Copy of Armed Forces Qualification Test (AFQT) for pamphlet was marked Plaintiffs' Exhibit A-41 for Identification.)

THE COURT: Now, may I see it, please. What I am trying to learn, Mr. Gardner, is just what can that tell. Is it an intelligence test; is it an aptitude test; what kind of a test is it?

MR. GARDNER: If Your Honor pleases, before the witness testifies, I do not believe the witness is qualified to answer what kind of a test it is. That is my concern: by carefully skirted questions other than the mere regurgitation of facts in the case.

Your Honor, there has been no showing that she can judge what a test is designed to measure.

MR. KUNSTLER: Your Honor, if I could question her on this.

BY MR. KUNSTLER:

Q Mrs. Conner, you saw the copies of the tests, did you not?

A No, I did not. I had the opportunity to do so, but I thought it was pointless since I am not an expert in testing.

At this point all I have is the Army's evaluation of this test; and they have, of course, people that are experts in testing. I am not.

MR. KUNSTLER: Your Honor, I think it might save any confusion in the record -- I am going to withdraw my attempt to offer in bits of marked portions of the article. I had not intended to do that in the beginning. I think I will stick to my original determination.

I would just like to offer in the statistical table which appears on page 9, the far right-hand corner of A-34a, and the other exhibits relating to the data that went into that statistical table. And I would like to stay away from the article which, I think, would be almost impossible to separate editorial content from factual material.

THE COURT: Well, the problem with the naked statistics is that without some explanation of what the test

BY MR. KUNSTLER:

Q Mrs. Donner, you saw the copies of the tests, did you not?

A No, I did not. I had the opportunity to do so, but I thought it was questionable since I am not an expert in testing.

At this point all I have is the Army's evaluation of this test; you may ask, of another, people that are experts in testing. I am not.

MR. KUNSTLER: Your Honor, I think it might save any confusion in the record — I am going to withdraw my attempt to offer in this of another portion of the article. I had not intended to be read in the medium. I think I will stick to my original determination.

I would just like to offer in the statistical table which appears on page 3, the far right-hand column of A-3s, and the other available relating to the date that went into that statistical table. And I would like to stay away from the article again. I think, would be almost impossible to separate editorial opinion from factual material.

THE COURT: Well, the problem with the raised statistics is that without some explanation of what the test

is the statistics would be meaningless, would they not? Do the statistics speak for themselves?

MR. KUNSTLER: Well, I think the statistics do speak for themselves, Your Honor. They show the failure rate on a national examination given by the Army which varies from State to State.

THE COURT: Is it a physical examination or is it a mental examination?

MR. KUNSTLER: Well, she can testify as to the parts of the examination, exactly what the parts are, physical parts of the examination are. That I believe she knows.

BY MR. KUNSTLER:

Q Do you not?

A Yes.

Q Would you indicate to His Honor what the parts of the examination are?

A The examination consists of one hundred questions in each of four areas: vocabulary, arithmetic, special relationships, and tool identification. The latter two are visual, and the former original two are verbal questions. The arithmetic questions are also verbal, not just computation.

Do the statistics speak for themselves?

MR. KUNSTLER: Well, I think the statistics do speak for themselves, Your Honor. They show the failure rate in a medical examination given by the Army which varies from state to state.

THE COURT: Is it a physical examination or is it a medical examination?

MR. KUNSTLER: Well, one can testify as to the parts of the examination, exactly what the parts are, physical parts of the examination are. That I believe the Court.

BY MR. KUNSTLER:

Q Do you have?

A Yes.

Q Would you indicate to His Honor what the parts of the examination are?

A The examination consists of one hundred questions in each of four areas: vocabulary, arithmetic, spatial relationships, and total identification. The first two are visual, and the second verbal but are verbal questions. The arithmetic questions are also verbal, but just computation.

Q Now as I understand it, Mrs. Conner, the Army does not permit copies of the test to be taken out, is that correct?

A That is right.

THE COURT: All right. Now, may I see the exhibit which you are offering.

I take it what you are offering is the State ranking of education indicators?

MR. KUNSTLER: It is the same thing, I think, Your Honor.

It is the right hand right there, Your Honor, far right, page 9.

THE COURT: Now as I understand it, Mr. Kunstler, you are now limiting your offer to the table which appears on the far right-hand side of page 9 of the magazine, American Education, which is Exhibit A-34a, is that right?

MR. KUNSTLER: That is correct, Your Honor, with the raw data which has already been offered in. If you are referring only to the article now, that is the only portion of the article we are offering in.

And we will withdraw A-34, Your Honor, which is an incomplete copy of that article.

Q. Now as I understand it, Mrs. Conner, the Army does not permit public or the press to be taken out, is that correct?

A. That is right.

THE COURT: All right. Now, may I see the exhibit which you are offering.

I take it what you are offering is the State reading of education legislature?

MR. KUNSTLER: It is the same thing, I think, Your Honor.

It is the right hand right there, Your Honor, far right, page 9.

THE COURT: Now as I understand it, Mr. Kunstler, you are now limiting your offer to the table which appears on the far right-hand side of page 9 of the magazine, American Education, which is Exhibit A-34. Is that right?

MR. KUNSTLER: That is correct, Your Honor, with the two data which has already been alleged in. If you are referring only to the activity map, that is the sole portion of the article we are offering in.

And we will withdraw A-34, Your Honor, which is an incomplete copy of that article.

THE COURT: Now, may I see the raw data that you are referring to.

The Court's ruling is that the exhibit A-34a limited to the chart on the far right of page 9 of the magazine, American Education, is admitted.

MR. CASHMAN: Your Honor, may I be heard, please.

THE COURT: Yes.

MR. CASHMAN: Your Honor, I have not had an opportunity, as the Court knows, to examine any of the raw data behind this particular document. Further, Your Honor, I have not even had an opportunity to present to the Court my secondary objections to the offer. I indicated to the Court that I thought it was not relevant without a showing of pertinency.

THE COURT: Mr. Cashman, the Court's understanding was that you were objecting on the ground of relevancy. There was no other objection offered, and the Court ruled it admissible over that objection of relevancy.

Now if you want to make some other objections to it, the Court will listen to you. However, I think it is the proper practice to make your objections all at one time and not in relays. Now, if you want to make some

THE COURT: Now, may I see the raw data that you are relying on.

The Court's ruling is that the exhibit A-3(a) limited to the chart on the far right of page 9 of the magazine, American Education, is admitted.

MR. GARNMAN: Your Honor, may I be heard, please.

THE COURT: Yes.

MR. GARNMAN: Your Honor, I have not had an opportunity, as the Court knows, to analyze any of the raw data behind this particular document. However, Your Honor, I have had occasion in appellate[illegible] to present to the Court my accumulated objections to the offer. I indicated to the Court that I thought it was not relevant without a showing of pertinency.

THE COURT: Mr. Garnman, the Court's understanding was that you were objecting on the ground of relevancy. There was no other objection offered, and the Court ruled it admissible over that objection of relevancy.

Now if you want to make some other objections to it, the Court will listen to you. However, I think it is the proper practice to make your objections all at one time and not in replay. Now, if you want to make some

objections, the Court will allow you to make some more objections.

MR. CASHMAN: Your Honor, the reason why I made my objection to relevancy first, and I think I even used the word initially, was because I was handed three documents of some detail and of some considerable girth. I thought I was going to be able to have the opportunity to take a look at those documents with respect to what the witness has been brought here to testify about. That is the only reason, Your Honor. It was not to do it in relays or anything like that.

I thought this objection might have been so controlling so that we could have avoided a waste of time.

I want to say this, Your Honor. It has been the testimony of this witness, I believe, that the statistical examination of this particular article was done not by her but by the other contributor, Mr. de Neufville, or whatever his name is. So, Your Honor, I don't even think this is the proper witness through whom this material should even come into this case. That is my second objection, Your Honor.

And as I say, I would like the record to be clear that there has been no showing at all that this test is the

objections, the Court will allow you to make some more objections.

MR. GASHMAN: Your Honor, the reason why I made my objection to relevancy first, and I think I was used to some initiative, was because I was invited into discussing of some detail and of some conditionals glib. I thought I was going to be able to have the opportunity to view a long at those documents with respect to what the witness has been brought here to testify about. That is the only reason, Your Honor. It was not to do it is relaxy or anything like that.

I thought this objection might have been so controlling as that we would have avoided a waste of time.

I want to say this, Your Honor. It has been the testimony of this witness, I believe, that the statistical examination of this particular article was done not by her but by the other contributor, Mr. de Heliville, or whatever his name is. So, Your Honor, I don't even think this is the proper witness through whom this material should even come into this case. That is my basic objection, Your Honor.

And as I say, I would like the record to be clear that there has been no showing at all that this test is the

kind of test that serves any relevant purpose with respect to the inquiries that we are making here.

Your Honor has had merely the barest description of what the test contains. Your Honor, we have here testimony merely that there is a vocabulary portion and an arithmetic portion, both of which are verbal, there are visual aspects in that there is a tool identification and a special relationship identification.

Now, Your Honor, that information alone, it is not even in what proportion these different aspects are elicited or in what proportion they exist on the test. Is it one-fourth of the test, is it a third, or is it broken down into further subdivisions?

Your Honor, without such a foundation, I do not believe that actually there has been a basis upon which the Court can receive the information.

THE COURT: This test shows that it is the basis on which the United States depends for the admission of its citizens to the Armed Services. Now, that is good enough for this Court.

MR. CASHMAN: Very well, Your Honor. May I then, since Your Honor has received it into evidence--

THE COURT: I am not receiving it into evidence

like to feel that answers my relevant questions with respect to the inquiries that we are making here.

Your Honor has had merely the general description of what the test contains. Your Honor, we have here testimony merely that there is a vocabulary portion and an arithmetic portion, both of which are verbal, there are visual aspects in that there is a test identification and a special relationship identification.

Now, Your Honor, that information alone, it is not even in what proportion these different segments are utilized or in what proportion they exist on the test. Is it one-fourth or the last, is it a third, or is it between down into further segmentations?

Your Honor, without such a foundation, I do not believe that actually there has been a basis upon which the Court can receive the information.

THE COURT: This test shows that it is the basis on which the United States expects the selection of its citizens to the Armed Services. Now, that is good enough for this Court.

MR. CASHMAN: Very well, Your Honor. May I then, since Your Honor has received it into evidence—

THE COURT: I am not receiving it into evidence

over this particular objection. If you want to have data and want to examine other witnesses in connection with it, the Court will give you permission to call these witnesses and examine them in connection with it.

But this is an official document of the United States. There is no objection that it is not an authentic document of the United States.

MR. CASHMAN: No objection to that, Your Honor.

THE COURT: It is the document which shows the test results of persons admitted in the Armed Forces of the United States, and certainly it is entitled to be admitted in evidence for what weight the Court decides should be given to it.

This is the statistical survey, if you will, of what the United States does in connection with admitting its citizens to its Army in the area of mental testing. And it doesn't take a great deal of education to know that these kinds of mental tests have some relation to the type of education the person taking the test has.

And for this reason, I would admit it subject to your further development of any basic data that you would like to get or any other witnesses you would like to have in connection with it, but simply for what weight

over this particular objection. If you want to have data and want to admitting other evidence in connection with it, the Court will give you permission to call those witnesses and examine them in connection with it.

But this is an official document of the United States. There is no question that it is not an authentic document of the United States.

MR. CARNEWAY: No objection to that, Your Honor.

THE COURT: It is the document which shows the that records of personnel assigned in the Armed Forces of the United States, and certainly it is admitted to be material in evidence for every reason the Court decides should be given to it.

This is the statistical survey, if you will.

If what you believe stands done in connection with admitting the attitude to its Army in the area of mental testing. And it doesn't take a great deal of knowledge to know that these kinds of mental tests have some relation to the type of education the persons taking the test have.

And for this reason, I would submit it subject to your further determination of any basic data that you would like to get or any other witnesses you would like to have in connection with it, and simply for what weight

should be allowed it considering the fact that it does represent what happens to particular type of citizens who take the tests in various parts of the country on an area basis.

It is not definitive in any way, but it just may be helpful.

MR. CASHMAN: Your Honor, just so that I will be clear with the Court, I want to indicate at this time that with respect to this particular statistic that has been offered, I have no dispute about its accuracy in terms of numerical display, and I am not asking this Court at this time to examine the people who collated this material.

My objection, Your Honor, goes to its relevancy in the suit and the fact that this witness, I think, was the witness who did not participate in this particular part of the article. I understood the text to be hers and the mathematical computations to be Mr. de Neufville.

But, Your Honor, in any event, I would ask the Court to permit me to do this. Since it is twelve o'clock, may I take the documents offered as the basic data and may I look at them over the luncheon recess and make whatever observations I have at that time to the Court?

THE COURT: Well, the Court will reserve further

should be allowed it considering the fact that it does [illegible] that [illegible] particular type of [illegible] and take the tests in various parts of the country on an area basis.

It is not definitive in any way, but it just may be helpful.

MR. CASHMAN: Your Honor, just so that I will be clear with the Court, I want to indicate at this time that with respect to this particular statistic that has been offered, I have no dispute based the accuracy in terms of numerical display, and I am not asking this Court at this time to examine the people who tabulated this material.

My objection, Your Honor, goes to its relevancy in the suit and the fact that this witness, I think, was the witness who did not participate in this particular part of the article. I understood the [illegible] to be both as the mathematical computations to be Mr. de Haerville.

But, Your Honor, in any event, I would ask the Court to permit me to do that. Then if is twelve o'clock, may I take the discussion offered as the basis data and my I look at them over the lunchtime recess and make whatever observations I have at that time to the Court?

THE COURT: Well, the Court will reserve further

rulings on these exhibits until you have had time to study them and make whatever statements or whatever other observations you would like to make with reference to them.

Now, do you want to question the witness at this time?

MR. CASHMAN: Your Honor--

THE COURT: Did you want to wait until after lunch?

MR. CASHMAN: If I could be given that opportunity, I would appreciate it.

THE COURT: Would it be convenient for you to come back after lunch, Mrs. Conner?

THE WITNESS: No, sir, but I will.

THE COURT: Thank you very much.

MR. KUNSTLER: Your Honor, I think the record should indicate that Mrs. Conner's deposition was taken at some length, I believe, yesterday.

MR. CASHMAN: Yes.

MR. KUNSTLER: And she had all these documents with her at that time for Mr. Cashman if he wanted to see any of them.

I would also like to indicate, Your Honor, if

rulings on these exhibits until you have had time to study them and more thoroughly familiarize yourself in matters other cross-rulings you would like to make with reference to them.

Now, do you want to question the witness at this time?

MR. DOBBS: Yes, Sir.

THE COURT: Did you want to wait until after lunch?

MR. CARPMAN: If I could be given that opportunity, I would appreciate it.

THE COURT: Would it be convenient for you to come back after lunch, Mrs. Conner?

THE WITNESS: No, sir, but I will.

THE COURT: Thank you very much.

MR. MARTIN: Your Honor, I think the record should indicate that Mr. Dobbs's cross-rulings were taken at some length, I believe, yesterday.

MR. CARPMAN: Yes.

MR. MARTIN: And you had all those documents with you at that time, Mr. Dobbs, if he wanted to see any of them.

I would also like to indicate, Your Honor, if

it is convenient to adjourn now, I have one more witness who will be here in time for the one o'clock resumption or one-fifteen, whatever Your Honor feels fit. And then Mrs. Conner can be here unless Mr. Cashman tells me he doesn't want her and I could head her off. But I will leave it up to you.

MR. CASHMAN: I very much would like Mrs. Conner to remain.

THE COURT: How long would this witness take?

MR. KUNSTLER: I am recalling Dr. Cline for five questions to cover an area which I omitted when I had him on the stand.

MR. CASHMAN: Your Honor, may I learn what this area of testimony is now with Dr. Cline?

MR. KUNSTLER: I forgot to ask him about the question of the local norms which Dr. Dailey had described. I just want to ask him five questions on that, on those local norms.

Dr. Dailey had indicated that the District of Columbia was complying with localnorms with its tests. I had omitted to ask him about this. I am asking Your Honor's permission just to bring him back for five questions on that.

It is convenient to adjourn now, I have one more witness who will be here in time for the one o'clock resumption or one-fifteen, whenever Your Honor feels fit. And then Mrs. Conner can be here unless Mr. Cashman tells me he doesn't want her. I would hate her to go. She's with Laura if we do that.

MR. CASHMAN: I very much would like Mrs. Conner to remain.

THE COURT: How long would this witness take?

MR. KUNSTLER: I am recalling Dr. Cline for five questions to cover an area which I omitted when I had him on the stand.

MR. CASHMAN: Your Honor, may I learn what this area of testimony is now with Dr. Cline?

MR. KUNSTLER: I forgot to ask him about the question of the Laura Jones match in Mr. Bailey's case. I just want to ask him five questions on that, on that local matter.

Dr. Bailey had indicated that the District of Columbia was complicit with Jackanovsky with the knife. I had omitted to ask him about this. I am asking Your Honor's permission just to bring him back for five questions on that.

THE COURT: The court will permit you to bring the witness back; and, counsel, you can make your objections at the time the questions are asked.

MR. KUNSTLER: That was an omission of counsel, Your Honor, an inadvertence of mine.

THE COURT: Now so that we can be further advised, what else is planned here? You have this witness, and you have Dr. Cline. Do you have other witnesses?

MR. KUNSTLER: No. Then I am prepared to rest, Your Honor.

THE COURT: And, Mr. Redmon, can you give us the status of the witness that you have?

MR. REDMON: We were advised yesterday, Your Honor, that she would not be available today. I get the impression that she is having a busy week, but I certainly would like to have her come back, say, on maybe Friday or whatever day is available to the Court.

And I have a further problem. I am going to call Mr. Dixon in view of this testimony back to testify. He is in Puerto Rico for the school system and will not be back until Thursday night.

THE COURT: You say you want to bring Mr. Dixon back?

THE COURT: The court will permit you to bring the witness back, however, you can make your objections at the time the questions are asked.

MR. KUNSTLER: That was an omission of counsel, Your Honor, an inadvertence of mine.

THE COURT: Now so that we can be further advised, what also is planned here? You have Dr. Cline and you have Dr. Cline. Do you have other witnesses?

MR. KUNSTLER: No. Then I am prepared to rest, Your Honor.

THE COURT: Now, Mr. Kunstler, can you give us the status of the witness that you have?

MR. REINOWN: We were advised yesterday, Your Honor, that she would not be available today. I got the impression that she is coming a long week, and I certainly would like to have her come back, say, on Friday or whatever day is available to the Court.

And I have a further problem. I am going to call Mr. Ideen in view of this testimony that is taking place in Bronx Court for the Grand Jury and will not be back until Thursday night.

THE COURT: You say you want to bring Mr. Dixon back.

MR. REDMON: Yes.

THE COURT: For what kind of testimony?

MR. REDMON: Surrejoinder, surrebuttal.

THE COURT: What would be the basis of this?

MR. REDMON: Well, as I indicated to the Court on Thursday, I questioned the need for Dr. Grambs' testimony in the first place. I think the inference has been left that there are books available to which Mr. Dixon has not made use.

I thought his testimony was quite clear, that as a principal he made a judgment with respect to the content of books and had used the books which are in evidence at this particular time.

However, I don't want that inference left open. I would prefer to bring him back and to look at the books that have been offered in evidence and to indicate which ones are in his school and why he isn't using them or why he is using them.

THE COURT: And you say that he is not available?

MR. REDMON: He is in Puerto Rico, left Friday.

Now, I can do this, Your Honor. Perhaps by tomorrow morning I can work out a set of what Mr. Dixon

MR. REDMON: Yes.

THE COURT: For what kind of testimony?

MR. REDMON: Impeachment, rehabilitation.

THE COURT: What would be the basis of this?

MR. REDMON: Well, as I indicated to the Court on Thursday, I questioned the man for Mr. Dixon's involvement in the Clay plate. I think you interrupted saying that there are books available to which Mr. Dixon has not made use.

I thought his testimony was quite clear, that as a principal he made a judgment with reference to the contents of books and had used the books which are in evidence at this particular time.

However, I don't want that inference left open. I would prefer to bring this man back to look at the books that have been offered in evidence and to indicate which ones are in his school and why he hasn't made them or why he is using them.

THE COURT: And you say that he is not available?

MR. REDMON: He is in Puerto Rico, left Friday.

Now, I can do this, Your Honor. Perhaps by tomorrow morning I can have the e-mail of Mr. Dixon

would say, some questions, and also with respect to the policy of the school board with respect to multiethnic books and what is available on the list. It might save us some time, but I don't want that inference left hanging, which I think is the only reason why Dr. Grambs was brought in to testify.

THE COURT: Did you take the other witness's deposition yesterday?

MR. REDMON: Yes, I did.

THE COURT: You indicated that you may find that you might substitute her deposition for further examination.

MR. REDMON: I did at the time, Your Honor, but I think it may be necessary to bring her back, unless we can work out some stipulation on the so-called surrebuttal or surrejoinder.

THE COURT: Well, I don't intend to string this case out, gentlemen. I have no objection, really, to your bringing Mr. Dixon back, but I think it may be easier to take his deposition if you want to take his deposition and have any further surrebuttal by deposition.

This Court wants to get finished with trying this case so that it can return to its work on the Court of Appeals.

would say, some questions, and also with respect to the policy of the Assistant Attorney General who prepared the indictments and what is available on the list. It might save us some time, but I don't want that interference left hanging, which I think is the only reason why Dr. Grambs was brought in as witness.

THE COURT: Did you take the other witness's deposition yesterday?

MR. REDMON: Yes, I did.

THE COURT: You indicated that you may find that you might substitute our deposition for further examination.

MR. REDMON: I did at the time, Your Honor, but I think it may be necessary to bring that back, unless we can work out some stipulations on the so-called nonessential or cumulative.

THE COURT: Well, I don't intend to strike this case out, gentlemen. I have no objection, really, in your bringing Mr. Hilton back, but I think it may be easier to take his deposition if you want to take his deposition and have any further nonessential by deposition.

This Court wants to get finished with trying this case so that it can return to the work on the Court of Appeals.

MR. REDMON: I just want to say for the record, Your Honor, that I am heartily in agreement with Your Honor's position. I have been away from private practice now for two months, and I am very much needed back in the firm.

So I would like to have this case cease also. But I want to be certain that the record is clear on some of these points. Now, if Mr. Kunstler and I can work out some stipulation with respect to testimony in connection with Dr. Grambs' testimony and what Mr. Dixon said and what he would say on Friday, I would have no objection to closing the case with respect to that aspect of it.

THE COURT: You might explore that with Mr. Kunstler. The Court's observations still remain, that we are not going to string this case out waiting for witnesses.

Now as far as this particular witness is concerned, Mr. Dixon, I won't rule before I hear from Mr. Kunstler, but my inclination would be to let you take his deposition and put his deposition in the record.

As far as testing his credibility and so on, I have already seen him. So it is not necessary for me to see him any more.

MR. REDMON: I agree with respect to the

MR. REDMOND: I just want to say for the record, Your Honor, that I am heartily in agreement with Your Honor's position. I have been only from [illegible] for two months, and I am very much needed back in the firm.

So I would like to have this case cease also.

But I want to be serious that the record is clear on one of these points. Now, if Mr. Kameter and I can work out some stipulation with respect to [illegible] in connection with Dr. Greene's testimony and then Dr. Sarno only and that he would say on Friday, I would have no objection to closing the case with respect to that aspect of it.

THE COURT: You might explore that with Mr. Kameter. The Court's observations still remain, that we are not going to spring this case out waiting for witnesses.

Now as far as this particular witness is concerned, Mr. Dixon, I won't rule before I hear from Dr. Kameter, but my inclination would be to let you take his deposition and put his deposition in the record.

As far as testing his credibility and so on, I have already done that. So it is his testimony for me to see the way.

MR. REDMOND: I agree with respect to the

credibility of Mr. Dixon.

THE COURT: So it seems to me that this remnant of the case, in view of the unavailability of Mr. Dixon right now, can be handled by deposition.

MR. KUNSTLER: We would have no objection to the deposition, Your Honor. We would indicate on the record any objections we had and then pass the deposition on to Your Honor.

THE COURT: You might discuss this matter with Mr. Redmon. Maybe you can work out some solution to both these problems.

MR. KUNSTLER: Dr. Grambs as well.

THE COURT: Now, as far as Dr. Grambs is concerned, it may be that we will resort to depositions in her cases, too, but I can reserve that until we see whether or not it is going to become necessary.

I think we should now recess until one-thirty. Do you want to take Dr. Cline before this witness?

MR. KUNSTLER: Yes, he would only be five minutes, Your Honor. He is going to answer five questions, subject to any cross examination.

THE COURT: Mrs. Conner, would you be kind enough to come back at quarter to two. Thank you. We will

availability of Mr. Dixon.

THE COURT: So it seems to me that this remnant of the case, in view of the unavailability of Mr. Dixon right now, can be handled by deposition.

MR. KUNSTLER: We would have no objection to the deposition, Your Honor. We would indicate on the record our objection as but we have gone into deposition on Your Honor.

THE COURT: You might discuss this matter with Mr. Dodson. Maybe you can work out some solution to both these problems.

MR. KUNSTLER: Dr. Grumbs as well.

THE COURT: Now, as far as Dr. Grumbs is concerned, it may be that we will resort to depositions in her cases, too, but I can reserve that until we see whether or not it is going to become necessary.

I think we should now recess until one-thirty. Do you mean to have Mr. Dixon before this afternoon?

MR. KUNSTLER: Yes, he would only be five minutes, Your Honor. He is going to answer five questions, subject to any cross examination.

THE COURT: Mrs. Conner, would you be kind enough to come back at another time. Thank you. We will

recess now until 1:30.

(The Court recessed at 12:10 p. m. and reconvened at 1:30 p. m.)

THE COURT: All right, sir, will you call your witness, please.

MR. KUNSTLER: Dr. Cline had to step out for a minute, Your Honor.

Do you wish to finish up with Mrs. Conner?

MR. CASHMAN: You asked that Dr. Cline take the stand first.

MR. KUNSTLER: He just stepped outside. We can wait one minute, Your Honor. I think he just stepped out for a second.

Your Honor, while we are waiting, I would like to just indicate, Your Honor asked the plaintiffs to look over Defendants' Exhibits 3, 4, 5, and 6 for Identification and indicate whether we had any objection. We would object to them, Your Honor. They are newspaper clippings from the Washington Star and Post, which relate to, I think, Dr. Hansen's testimony. And one of them is 1951 entitled D. C. educators consider an eventuality. That is No. 3. No. 4 is a 1951 article about a four day kindergarten week. And No. 5 is undated -- pardon me, it is the Post of

recess now until 1:30.

(The Court recessed at 12:10 p. m. and reconvened at 1:30 p. m.)

THE COURT: All right, sir, will you call your witness, please.

MR. KUNSTLER: Dr. Olins had to step out for a minute, Your Honor.

Do you wish to finish up with Mrs. Conner?

MR. CASHMAN: You asked that Dr. Olins be the next item.

MR. KUNSTLER: He just stepped outside. We can wait one minute, Your Honor. I think he just stepped out for a second.

Your Honor, while we are waiting, I would like to put testimony, Your Honor, based on stipulation to have over Defendants' Exhibits 31, 32, and 33 identified and indicate whether we had any objection. We would ask to them, Your Honor. They are newspaper clippings from the Washington Star and Post, which relate to, I think, Dr. Spock's testimony. Any one of them is legal evidence. U. S. educators convicted on conspiracy. That is No. 32. No. 4 is a 1971 article about a two day kidnapping week. And No. 5 is headed -- pardon me. It is the top of

February 14, 1953. And No. 6 is the Post of February 8th, 1953, both of which the last two have to do with a tax by several Congressmen on aspects of the D. C. integration feelers, I believe, that they refer to.

We object on the grounds that they are hearsay and would put our objection on the record.

MR. CASHMAN: Your Honor, they were offered to show the temper of the times and to relate to any question of intent in this lawsuit. They were offered for that purpose, Your Honor.

THE COURT: What are the numbers?

THE DEPUTY CLERK: Defendants' No. 3, No. 4, No. 5, and No. 6.

THE COURT: All right. The Court will reserve ruling.

I think we have a witness, unless you want to say something further.

MR. KUNSTLER: I want to say one more thing, Your Honor.

W-4, which are the minutes of the April 15, 1963, meeting of the Board of Education, '64, I believe, were furnished to us by the defendants. As the defendants have indicated, page 63 -- this is the transcript, not the

February 14, 1952. And No. 2 in the root of Polyvency Exh. 1923, both of which the Jane Doe have to do with a few of several Congressmen on behalf of the I. G. Investigation Tester, I believe, that they refer to.

We object on the grounds that they are hearsay and would put our objection on the record.

MR. GASHMAN: Your Honor, they were offered to show the temper of the times and be relevant to any investigation of labor in this country. They were offered for that purpose, Your Honor.

THE COURT: What are the numbers?

THE SECRET CLERK: Defendants' No. 3, No. 4, No. 5, and No. 6.

THE COURT: All right. The Court will reserve ruling.

I think we have a witness, unless you want to as something further.

MR. KUNSTLER: I want to say one more thing, Your Honor.

W-4, which are the minutes of the April 15, 1953, meeting of the Board of Education, '04, I believe, were furnished by or to the Subcommittee. As the mimeographed copy indicates, page 63 -- this is the transcript, not the

minutes -- page 63 of the transcript is missing. The defendants were going to check on the availability of the minutes, I believe, and let Your Honor know so that we could offer in as W-4 as our exhibit and give the minutes an appropriate lettered number designation.

MR. CASHMAN: Your Honor, we have received the minutes. We have misplaced them. We are presently trying to locate them. They are somewhere in our possession. We will make them available to the other side.

THE COURT: Is there a page missing?

MR. CASHMAN: There is a page missing, yes.

THE COURT: Is that just a paging error or is there physically a page missing?

MR. KUNSTLER: There is physically a page missing. I will just check, if Your Honor will give me one moment.

MR. CASHMAN: It is page 63, Your Honor.

MR. KUNSTLER: It is 63, and it doesn't make sense to go from 62 to 64.

MR. CASHMAN: And we are having that reproduced, Your Honor, and it is going to be sent down to us.

THE COURT: All right, sir.

MR. KUNSTLER: We might as well give a number to the minutes and call the minutes W-4a, and we will offer them both into evidence, Your Honor, when they arrive. I

minutes -- page 63 of the transcript is missing. The defendants were going to waive the availability of the minutes, I believe, and let Exec Sumr know so that we could offer in as well as our rebuttal and give the minutes an appropriate factual number designation.

MR. GASHMAN: Your Honor, we have received the minutes. We have displayed them. We are investigating it at locaxx venue. They are numbered in the pretrial. We will make them available to the other side.

THE COURT: Is there a page missing?

MR. GASHMAN: There is a page missing, yes.

THE COURT: Is that just a paging error or is there physically a page missing?

MR. KUNSTLER: There is physically a page missing. I will just state, if Your Honor will give me one minute.

MR. GASHMAN: It is page 63, Your Honor.

MR. KUNSTLER: It is 63, and it doesn't make sense to go from 62 to 64.

MR. GASHMAN: Let me be saying that immediately, Your Honor, and it is going to be sent down to us.

THE COURT: All right, sir.

MR. KUNSTLER: We might as well give a number to the minutes and call the minutes 7-63, and we will enter them into evidence, Your Honor, when they arrive. I

want the record to indicate that we are not overlooking them.

THE COURT: W-4 and W-4a, is there any objection to that offer?

MR. CASHMAN: Your Honor, we admit their authenticity. We do not admit,with respect to the transcript of the proceedings, the truth of every assertion that is made therein; but it is the authentic document; and it does reflect what was said there. However, as I say, Your Honor, we make no observation that what was said at this meeting is necessarily true. However, that is what was said.

THE COURT: The Court will admit W-4 and W-4a.

MR. KUNSTLER: Thank you, Your Honor.

(W-4 and W-4a for Identification were received in evidence and marked W-4 and W-4a, respectively.)

THE COURT: Turn them over to the Clerk when they are available.

Thereupon,

MARVIN G. CLINE

was recalled as a witness for the plaintiffs and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE COURT: W-4 and W-4a, is there any objection to that effect?

MR. GASKMAN: Your Honor, we admit their authenticity. We do not admit, you varied in the introductory of the proceedings, the issue of what evidence that is some somewhat but it is the authenticity somewhat but it does rather what was said there. However, as I say, Your Honor, we only do observation that what was said at that meeting is materially true. However, that is what was said.

THE COURT: The Court will admit W-4 and W-4a.

MR. GASKMAN: Thank you, Your Honor.

(W-4 and W-4a for identification were received in evidence and marked W-4 and W-4a, respectively.)

THE COURT: Turn them over to the Clerk when they are available.

Thank you.

MARVIN G. CLINE

was recalled as a witness for the plaintiffs and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KUNSTLER:

Q Now, Dr. Cline, I just have a few questions. I ask you, have I furnished you and have you readpages 6387 to 6396 of the transcript of this case.

A Yes, I have.

Q And I ask you whether you have any opinion, based on your own experience, research, and background, as to Dr. Dailey's definition of the term local norm as used in his testimony which is reflected by those pages.

A Dr. Dailey's definition of local norms? Well, in the first instance, a local norm is ordinarily a city-wide norm; and, of course, as I gather, the population that Dr. Dailey is using for his norm is not citywide. It is just those twenty-two or thereabouts schools in the city that are receiving aid under Title 1 of the Elementary and Secondary Act; and these are just the low performing poverty level schools in the city.

But the way in which he is using the term local norms is a popularly used way, but I think it is a misreading of the meaning of local norms.

In other words, what he is doing is simply taking a series of standard tests and administering them to the children in these twenty-two some odd schools in the city

BY MR. ARMSTRONG:

Q Now, Mr. Olins, I just have a few questions. I ask you, have I therein you not been you reading 6[illegible] to 6356 of the transcript of this case.

A Yes, I have.

Q And I ask you whether you have any opinion, based on your own experience, research, and learning, as to Mr. Daley's definition of the term local norm as used in his testimony which is reflected by those pages.

A Mr. Daley's definition of local norms? Well, in the first instance, a local norm is ordinarily a sixth-grade norm and, of course, as I believe, the population that Mr. Daley is using for the norm is not adequate. It is just three hundred-odd or five-hundred-odd in the city that are receiving sub-normal Title 1 at the Elementary and Secondary Ages, and these are just the low performance poverty level schools in the city.

But the way in which he is using the term local norm is a peculiarly loose way, and I think it is a misreading of the meaning of local norms.

In other words, what he is doing is simply taking a sample of students here and administering them to the children in these twenty-two and schools in the city

and then distributing, getting a distribution of the scores of these children on these particular tests.

Now to the extent that a test is not reliable because of the use of inappropriate or inadequate standardization norms, collecting scores from children on inappropriate or unreliable tests and using them as citywide distribution or even subcitywide distribution does not adequately satisfy the requirements that one would want when one sets up for local norming.

What Dr. Dailey is describing is by far a tremendous increase pertaining to the usefulness in a testing program of the District of Columbia, and it is a highly desirable step; but it is not, I would say, the establishment of true local norms.

Q Now, Dr. Cline, Dr. Dailey testified, as you have read, that he expected or was in the process of feeding into a computer a lot of statistics he had about a child: his test score, the color of his skin, what neighborhood he came from, and the like.

How accurate would be the results as a predicter of doing this, in your opinion?

MR. CASHMAN: Your Honor, I am going to object to the question in that it is too general to answer. There

and then distributing, yielding a distribution of the scores of these children on these particular tests.

Now is the extent that a test is not reliable because of the fact of inappropriate or inadequate stimulation norms, collecting scores from children of inappropriate or unsuitable ages and using them as criterion distributions or even subjective distribution and so forth, satisfy the requirements that one would want one to write in for local norming.

What Dr. Bailey is describing is by far a tremendous increase contributing to the sophistication in a testing program of the District of Columbia, and it is a highly desirable step; but it is not, I would say, the establishment of true local norms.

Q. Now, Dr. Cline, Dr. Bailey testified, as you have read, that he attempted to use in the process of creating tests a computer a lot of criteria to test those a point. His test score, the value of his rating, and independence he came from, and the like.

Are separate scale in the results of a medicine of doing this, in your opinion?

Mr. SATCHER. Your Honor, I am glad to object to the question in that it is not proper to answer. Does

has been no establishment of exactly what Dr. Dailey was going to put into what computer, in what amounts, or on what basis.

Your Honor, I think the mere general description of what Dr. Dailey said in terms of a question to this witness is meaningless.

THE COURT: Is what Dr. Dailey proposes to do described in these pages of the transcript?

MR. KUNSTLER: It is, fairly extensively, Your Honor.

THE COURT: I see. Dr. Cline, you have read these pages of the transcript?

THE WITNESS: Yes, sir, I have.

THE COURT: And do you recognize from the question what you read in connection with that question in that transcript?

THE WITNESS: Yes, sir. I think that Mr. Kunstler's question is appropriate to the information that is supplied by Dr. Dailey in the transcript.

THE COURT: What did you understand the question to entail?

THE WITNESS: Well, he wants to know whether the predictive characteristics of Dr. Dailey's program

has been no specificness or exactly what Dr. Dailey was going to put into his own language, in your account, or in your [illegible].

Your Honor, I think the mere general description of what Dr. Dailey was in terms of a question to this witness is meaningless.

THE COURT: Is what Dr. Dailey proposes to do described in these pages of the transcript?

Mr. [illegible]: It is, fairly accurately. Yes, Sir.

THE COURT: I see. Dr. Cline, you have read these pages of the transcript?

THE WITNESS: Yes, sir, I have.

THE COURT: Are the surgeons here the question what you read in connection with that question in that transcript?

THE WITNESS: Yes, sir. I think that Mr. [illegible]'s question is appropriate to the information that is supplied by Dr. Dailey in the transcript.

THE COURT: What did you understand the question to ask?

THE WITNESS: Well, he wants to know whether the practitioners [illegible] of Dr. Dailey's [illegible]

represent a significant improvement over the use of the tests alone or any other technique of prediction about academic achievement or postdiction of academic failure.

THE COURT: And this would be described in his testimony at pages 63 to 87 of the transcript?

THE WITNESS: Yes, sir.

THE COURT: All right. I will overrule the objection.

BY MR. KUNSTLER:

Q Can you answer the question, Doctor?

A I would say that Dr. Dailey's description of his program conforms to the standard and very sophisticated procedures that have been developed recently for making more accurate and more efficient predictions about the performance of children at all levels; and there isn't, as I said before, any doubt but that he is adding a significant increment of value to the testing program to the city. He is attempting to relate test performance to a great range of other educational and educationally related experiences of these children. And that is terribly important.

The point, though, that I think we are making is that the prediction or the predictive efficiency of a measuring instrument of any of the tests that are being used

represent a significant improvement over the use of the tests alone or any other technique of prediction about academic achievement or prediction of academic failure.

THE COURT: And this would be described in his testimony at page 73 to 75 by at the [illegible]?

THE WITNESS: Yes, Sir.

THE COURT: All right. I will overrule the objection.

MR. [illegible]:

Q. Can you answer the question, Doctor?

A. I would say that Dr. Bailey's description of his program applies to the standard and very organized procedures that have been developed relatively for making more accurate and more efficient predictions about the performance of students at all levels and there isn't, as I said before, any doubt but that he is making a significant improvement of value to the testing program in the city. He is attempting to relate test performance in a great range of other educational and commercially related experiences of these children. And that is usefully improvement.

The point, though, that I think we are making is that the prediction of the predictive efficiency of a measuring instrument if any of the tests that are valid and

now, the predictive efficiency of these tests are dependent upon, in the first instance, the way in which the test was standardized, the way in which it was constructed. And I think what I was trying to say in my earlier testimony that was related to this is that unless the test is standardized on a population that is directly comparable to the population to whom the test will be administered as a test population, then the reliability and the predictive efficiency of the instrument is severely impaired.

Now, there is a big difference between administering a partially unreliable instrument to a group of students, unreliable because those students in the test population are not directly comparable to the students in the standardization population. There is a big difference between administering an unreliable instrument to a group of students and then plotting out the distribution of their scores and calling this a local norm to restandardizing, reanalyzing, and reorganizing the structure of the tests on the local population, that is, the population to whom the test is to be administered.

Q Does the method of Dr. Dailey that you have read in those pages which I have indicated to you, does it encompass restandardizing the standardized tests for the D. C. population?

Now, the predictive efficiency of these tests are dependent upon, in the first instance, the way in which the test was standardized, the way in which it was constructed. And I think what I was trying to say in my previous testimony that was related to this is that unless the test is standardized on a population that is directly comparable to the population to whom the test will be administered as a test population, then the validability and the predictive efficiency of the instrument is severely impaired.

Now, there is a big difference between administering a particular correlative instrument to a group of students, available because some students in the test population are directly comparable to the students in the standardization population. There is a big difference between administering an unavailable instrument to a group of students and then plotting out the distribution of their scores and calling this a local norm for predictability, examining, and recognizing the structure of the tests on the local population, that is, the population to whom the test is to be administered.

Does the making of Dr. Smith's test you have read in these papers which I have indicated to you, does it encourage validating the standardized tests for the D. C. population?

A No. It involves only the redistribution of scores on the nationally standardized test for different subpopulations within the District of Columbia; and that, of course, is a very restricted set of subpopulations or those populations that are involved in the elementary and secondary area act schools.

As I said before, to redistribute such scores, according to subpopulations, is a significant advance, but it is not restandardizing.

When a test is constructed on a standardization population, the individual questions that are selected by the test constructor as valuable for his tests as opposed to the test questions that he discards because they are not good measuring instruments, the individual questions that are selected by the test constructor are selected because they themselves, each one, have been identified through statistical procedures as questions that help meaningfully and precisely measure children on some scale; that is, they are questions that can tell the difference between children who are in fact at different levels of achievement or maturation.

Now, in order to construct a useable instrument, that is, an instrument that speaks to the typical child

in a standardization population, the normal procedure is to select those items that one has already identified as effective and precise measuring items, to select those items that have maximum measuring precision at the middle range of abilities, that is, the usual standard is to say that a standard achievement test will have about eighty percent of all items maximally precise for those children in the middle range of the ability distribution of the standardization population.

Now, that means that only ten percent of the items that are used in that test can make decent measurements that are reasonably precise measurements at the lower end of the scale for the lower performing children and only ten percent of those items can make decent measurements or precise measurements for children at the upper end of the scale. That means that that measuring instrument has maximum precision only to the middle range of performing children.

MR. CASHMAN: Excuse me, Mr. Witness. Your Honor, this seems to me to be testimony that is related now to Dr. Lennen's testimony and not to Dr. Dailey;s testimony. We are talking about standardization populations and the measurement ability of standardized tests. That was the

total amount of testimony that concerned Dr. Lennen, not Dr. Dailey.

We are getting into standardized tests, not now local norms, Your Honor.

THE COURT: Well, Mr. Kunstler, haven't you made your point? As I understand the point, maybe I missed it, it is that, according to Dr. Cline, local norms must be standardized on the local community; and unless they are so standardized on the local community, they are no more helpful than tests that are standardized on other communities or standardized on the United States generally.

Isn't that the point you are trying to make?

MR. KUNSTLER: That is it. I am content, Your Honor.

I have no further questions.

MR. CASHMAN: I am content with Dr. Dailey's testimony, Your Honor.

THE COURT: All right. Thank you very much, Dr. Cline.

(Witness excused.)

MR. KUNSTLER: With that, Your Honor, the plaintiff has no further witnesses in rebuttal, except Mrs. Conner.

total amount of legislation that concerned Dr. Lazarus and Dr. Bailey.

We are getting into standardized tests, not now local scope, Your Honor.

THE COURT: Well, Mr. Lundquist, haven't you made your point? As I understand the rule, maybe I misses it. Is it that, according to Dr. Cline, local norms must be standardized on the local community and isolate that one be standardized on the local community, they are in more balanced than tests that are standardized on other communities or standardized on the United States generally.

Isn't that the point you are trying to make?

MR. KUNSTLER: That is it. I am content, Your Honor.

I have no further questions.

MR. CARMAN: I am content with Dr. Bailey's testimony, Your Honor.

THE COURT: All right. Thank you very much, Dr. Cline.

(Witness excused.)

MR. LEVIRAM: With that, Your Honor, the plaintiff has no further witnesses in rebuttal, rebut. Ten. Cannot.

THE COURT: All right. We will wait for Mrs. Conner now.

Mrs. Conner, will you take the stand, please.

Thereupon,

CARYL CONNER

resumed the witness stand.

CROSS EXAMINATION

BY MR. CASHMAN:

Q Mrs. Conner, I am going to show you Plaintiffs' Exhibit A-40 which has been marked for identification; and apart from the covering letter, I am going to ask you to describe to the Court what is in that exhibit.

A It is a typed copy of a manuscript which, I think, was either the last or the next to last version of the article called How Good Are Our Schools.

Q Yes. Now the article called How Good are Our Schools is the article that appears on pages 1 through 9 of the October issue of American Education, isn't it?

A Yes.

Q Now, can you tell me how many men from the District of Columbia were examined in connection with the table that is on the rightmost side of page 9 of your article?

A Yes.

THE COURT: All right. We will wait for Mrs. Conner now.

Mrs. Conner, will you take the witness, please.

(Recess.)

(Whereupon,

resumed the witness stand.

CROSS EXAMINATION

BY MR. CADEMAN:

Q Mrs. Conner, I am going to show you Plaintiff's Exhibit A-4a which has been marked for identification, and ask you to describe to the Court what is in that exhibit.

A It is a typed copy of a manuscript which, I think, was either the last or the next to last version of the article called How Good Are Our Schools.

Q Yes. Now the article called How Good are Our Schools is the article that appears on page 1 beginning at the bottom there of Lawrence Spivak, isn't it?

A Yes.

Q Now, you told us you were one time the District of Columbia Vice President in charge of the Table Talk is on the right-hand side of page 1 of your article?

A Yes.

Q All right. How many men were examined?

A What I have the table on, Negroes, right?

Q I asked you if you know how many men were examined.

A Yes, I have that information here, but it is not in evidence. Do you want me to give it to you now?

Q Yes. Can you tell me, please?

A Sure, 2,054.

Q And of that number, how many were Negro?

A 1,625.

Q Now, can you tell me how many men from the State of Colorado, how many Negro men were examined?

A 42.

Q Now, you say 42?

A That is right.

Q And the figures for Colorado are contained in the table, are they not, to which we are making reference, the table on page 9 that has been offered?

A The percentage figures?

Q Yes.

A Yes. I don't know. I assume they are, aren't they?

Q Do you have a copy of that before you?

A Yes.

Q All right. How many men were examined?

A What I have the table on, Negroes, right?

Q I asked you if you know how many men were examined.

A Yes, I have that information here, but it is not in evidence. Do you want me to give it to you now?

Q Yes. Can you tell me, please?

A Sure, 2,054.

Q And of that number, how many were Negro?

A 1,180.

Q Now, can you tell me how many men from the State of Colorado, how many Negro men were examined?

A 42.

Q Now, you say 42?

A That is right.

Q And the figures for Colorado are contained in the table, are they not, or relate to the matter referred, the table on page 9 that has been offered?

A The percentage figures?

Q Yes.

A Yes. I don't know. I assume they are, aren't they?

Q Do you have a copy of that before you?

A Yes.

Q Please pull it out. Kindly refer to the table that has been offered to this Court.

A Did you ask me a question? I am sorry.

Q What I asked you was whether or not with 42 men I believe you said as the Negro sampling in Colorado, whether the Colorado percentage figures are in the table offered to the Court.

A Yes.

Q Now, would you kindly refer, please, to Nevada, and will you indicate to me how many Negro men were examined in connection with that percentage breakdown?

A 85.

Q Now, in connection with the State of Kansas, would you tell me how many Negro men were examined?

A 170.

Q In connection with Montana, how many Negro men were examined?

A I can't find it. One.

Q Now, I ask you if there is an explanation at the bottom of the chart, the tabular chart we are referring to, that makes reference to "too small--figure meaningless"?

A Yes.

Q And what kind of a representation is that on the

Q Please pull it out. Kindly refer to the table that has been offered by Mr. Ulmer.

A Did you ask me a question? I am sorry.

Q What I asked you was whether or not with 42 men I believe you said at the Sugar Association in Gainesville, Kansas the different percentage figures had in the table offered to the Court.

A Yes.

Q Now, would you kindly refer, please, to Nevada, and will you indicate if on the Sugar Beet was worked in connection with that percentage breakdown?

A No.

Q Now, in connection with the State of Kansas, would you believe that many Sugar Beet are cultivated?

A 1%.

Q In [illegible], but only Sugar Beet are worked there?

A I don't find it.

Q Now, I ask you if there is an explanation at the bottom of the chart, the column under the heading by that Beign referred to "Non-Beet-Sugar-Beet-Lines"?

A Yes.

Q Are real kind of a recommendation is that on the

chart? What on the chart means, "too small--figure meaningless"?

A Two stars.

Q All right. Now, with respect to Montana, do those two stars appear?

A No, and they certainly should. I would like to go back and change it.

Q With respect to Kansas, do they appear?

A No.

Q With respect to Nevada, do they appear?

A No.

Q With respect to Colorado, do they appear?

A No.

Q Well, did I ask you any more than those States?

A I really don't remember.

Q I don't myself. Now, consulting that tabular chart again, if you will, please, would you indicate to me how many Negro men were examined in Mississippi?

A 3,685.

Q North Carolina?

A 3,560.

Q Tennessee?

A 1,261.

short [illegible] in the [illegible] [illegible], "the small-[illegible] [illegible]"?

A [illegible].

Q All right. Now, with respect to Montana, do those [illegible] [illegible]?

A Mr. [illegible] [illegible] [illegible]. I would like to go back and [illegible] it.

Q With respect to Kansas, do they appear?

A No.

Q With respect to Nevada, do they appear?

A No.

Q With respect to Colorado, do they appear?

A No.

Q Well, did I ask you any more than those states?

A I really don't remember.

Q I don't expect. [illegible] something that [illegible] [illegible] again, if you will, please, would you indicate to me how many [illegible] who were mentioned in [illegible]?

A [illegible].

Q [illegible]?

A [illegible].

Q [illegible]?

A [illegible].

Q Louisiana?

A 3,710.

Q Virginia?

A 2,984.

Q Alabama?

A 3,454.

Q Georgia?

A 3,037.

Q Arkansas?

A 1,070.

Q Florida?

A 3,257.

Q And again, the District of Columbia?

A 1,625.

Q Now, of the ones that I just read, the group I just read you beginning with South Carolina, and concluding with Arkansas, I am going to ask you if the District of Columbia did not score better than all those States in terms of the Negro achievement on this particular examination.

A The District of Columbia Negro failure rate was not as bad as the deep South States.

Q And of the States that I just indicated--

Q Graduation

A 3,316.

Q Virginia?

A 3,304.

Q Alabama?

A 3,295.

Q Georgia?

A 3,277.

Q Arkansas?

A 3,271.

Q Florida?

A 3,257.

Q And again, the districts of Columbia?

A 3,255.

Q Now, of the ones that I just read, the group I just read you beginning with South Carolina, and excluding with Arkansas, I am going to ask you if the districts of Georgia did not score better than all those above in terms of the Negro achievement on this particular examination.

A The districts of Columbia Negro failure rate was not as bad as the deep South States.

Q And of the states that I just indicated--

A All of which were the deep South States.

Q Now, in terms of the national average of Negro failure on this AFQT test across the country, what was the failure rate among Negroes across the country?

A 67.5.

Q And, therefore, the District of Columbia was below the national average as far as failure rate among Negroes is concerned, is that correct?

A It was. I think you have to bear in mind the bulk of the Negro population is in the deep South.

Q The bulk of the Negro population is not what I was asking you. I was asking you whether on a national scale the District of Columbia did better than the national average.

A Yes.

Q Now, I see that on pages 8 and 9 there are other tables, Mrs. Conner, and I am going to ask you to consider the first table on page 8, which--

MR. KUNSTLER: Your Honor, I am going to object to any testimony that has to do with other charts. We offered one chart, and the testimony was directed to one chart.

MR. CASHMAN: Your Honor, if I may explain the reason for the line of questioning.

THE COURT: I thought perhaps you would like to

A All of which were the deep South States.

Q Now, in terms of the national average of Negro failure on this NPAT test among the country, what was the failure rate among Negroes across the country?

A MT.Ch.

Q [illegible], the district of Columbia was higher the national average on the failure rate among Negroes is concerned, is that correct?

A It was. I think you have to bear in mind the bulk of the Negro population is in the deep South.

Q The bulk of the Negro population is not what I was asking you. I was asking you whether or not the District of Columbia did answer than the national average.

A Yes.

Q Now, I am sure you'll see I've got 9 times are which Dallas, Tex. Counsel, and I am going to ask you to consider the first table on page 8, which--

MR. KUNSTLER: Your Honor, I am going to object to any testimony that may be given after hearsay. He offered the chart, and the testimony has already it was about.

MR. CARRAWAY: Your Honor, if I may explain the reason for the line of questioning.

THE COURT: I thought perhaps you would like to

finish your question first.

MR. CASHMAN: I would prefer to.

MR. KUNSTLER: Did I interrupt? I am sorry.

BY MR. CASHMAN:

Q Would you kindly tell me with respect to that chart what its title is and what the source is, please?

A The title is the "Estimated percent of illiteracy in population over 14: 1960," and the source is the Bureau of the Census.

Q Thank you.

MR. CASHMAN: Your Honor--

THE COURT: Suppose you ask another question, and maybe counsel will have an objection to that.

BY MR. CASHMAN:

Q In connection with the presentation of this table, that is, the first table on page 8, the one you have just described, did you undertake to check the accuracy of that table also?

A You mean, did I try to verify the figures?

Q Yes.

THE COURT: Just a minute, please.

MR. KUNSTLER: Your Honor, at this time I want to interpose the objection again, because this chart is one

finish your question first.

Mr. [illegible]: I would prefer to.

MR. KUNNELMAN: Did I interrupt? I am sorry.

MR MR. [illegible]:

Q Would you kindly tell me with respect to that chart where the table in the [illegible] [illegible]?

A The table is the "Statistical Summary of Military in operations over 14: 1900," and the source is the Bureau of the Census.

Q [illegible]

MR. [illegible]: Your Honor--

THE COURT: Suppose you ask another question, and maybe [illegible] will [illegible] an [illegible] in time.

MR MR. [illegible]:

Q In addition with the presentation of this table, that is, the first study on page 6, the one you have your description, did you [illegible] to [illegible] the summary of that table also?

A You mean, did I try to verify the figures?

Q Yes.

THE COURT: Just a minute, please.

MR. [illegible]: [illegible], if that [illegible] I [illegible] [illegible] the objection again. [illegible] [illegible] in the

of the ones that was not even offered by us, it wasn't testified to, and I think for that reason alone the questioning should be prohibited on it. But, again, it is not even relevant to the inquiry, Your Honor, on the direct examination.

THE COURT: What is the purpose of the question, Mr. Cashman?

MR. CASHMAN: The purpose of the question is this, Your Honor. I am interested not only in the chart that was offered to this Court but I am interested in all the charts that appear on this page.

I thought it might save some time for the Court if I were able to establish through this witness that the figures that are on these tables are as authentic as are the figures that have been presented to this Court in the single table from the two pages that have been offered.

I thought that by doing that, Your Honor, I might at a later time offer the entire tabular presentation to give the Court a fuller picture on a statistical basis of the District of Columbia in relation to the entire ranking by State other than just limiting it to the performance for eighteen year olds over an eighteen month period.

Now, if it is Your Honor's wish that I let the

of the ones that was not even offered by us, it wasn't testified to, and I think for that reason alone the questioning should be prohibited on it. But, again, it is not even relevant to the inquiry, Your Honor, on the direct examination.

THE COURT: What is the purpose of this question, Mr. Lashmann?

MR. CASHMAN: The purpose of the question is this, Your Honor. I am interested not only in the exact that was offered to this Court but I am interested in all the charts that appear on this page.

I thought it might save some time for the Court if I were able to examine witness about the figures that are on these tables are in accordance or are the figures that have been presented in this Court in the single table from the two pages that have been offered.

I thought that by doing that, Your Honor, I might at a later time offer the entire tabular presentation to give the Court a fuller picture on a statistical basis of the interest of Chemcia in relation to the entire revenue by State after that just limiting it to the performance for eighteen year-old over an eighteen month period.

Now, if it is Your Honor's wish that I let the

witness go with respect to this, I would be happy to subpoena the witness and bring her back for the purposes of clarification of these tables; and that isthe purpose of my line of questioning, Your Honor.

THE COURT: Well, just to clear some of this, with reference to the rest of these tables, were they verified, the tabulations and so on, in the same way as the table for eighteen year olds as shown on the right-hand side of page 9?

THE WITNESS: I did not resubmit this material to the Department of Commerce for verification after it was in print, but the material is verifiable. It is in print elsewhere in Federal publications, yes.

THE COURT: Did you submit the table on the eighteen year olds, the one on the right-hand side?

THE WITNESS: The Defense Department received all the material to check, but this eighteen year old material has never been published. We had a worksheet. It has never been in print. The Bureau of the Census material is published, and it is available in a variety of sources. We put this in for comparative purposes only. It is not new material.

THE COURT: I see. And you are testifying now that these other tables come out of the Bureau of the Census?

witness go with respect to this, I would be happy to

[illegible] the witness and bring her back for the purposes of

identification of these tables; and that is the purpose of my

line of questioning, Your Honor.

THE COURT: Well, just to clear some of this,

with reference to the rest of these tables, were they

verified, the tabulations and so on, in the same way as the

table for eighteen year olds as shown on the right-hand

side of page 97

THE WITNESS: I did not resubmit this material

to the Department of Commerce for verification after it was

in print, but the material is verifiable. It is in print

elsewhere in Federal publications, yes.

THE COURT: Did you submit the table on the

eighteen year olds, the one on the right-hand side?

THE WITNESS: The Federal Department verified all

the material in chief, but this eighteen year old material

has never been published. We had a workshop. It has never

been in print. The Census of the Native material is published,

and it is available in a variety of formats. We put this in

for comparative purposes only. It is old census material.

THE COURT: I see. And you are testifying now

that these other tables were not of the Bureau of the

Census?

THE WITNESS: No. This first table he is now referring to is a Bureau of the Census table.

MR. CASHMAN: You see, Your Honor, there are different sources for the tables. Table 2 is Office of Education; table 3 is the Census Bureau; table 4, Office of Education again.

All I wanted to indicate, Your Honor, through this witness was that these tables that appear in connection with this entire presentation are statistically correct to the best of the understanding of the witness and come from official sources.

MR. KUNSTLER: Your Honor, I might say here that unless she had some hand in preparing this material or obtaining it, I don't know if she can answer that question. The other material, the table that we referred to, was one she has worked with and gotten the raw data and assembled.

So I just make that observation, Your Honor, if it is any aid to Your Honor's ruling.

THE COURT: The point is that all of this material seems to be official Government documents.

THE WITNESS: It is.

THE COURT: Or have some source in official Government documents.

THE WITNESS: No. This first table he is now referring to as a Bureau of the Census table.

MR. CASHMAN: You see, Your Honor, there are different sources for the issues. While I do agree of Statistical; table 3 is the Quality Control, table 4, Letter of Education again.

All I wanted to indicate, Your Honor, through this witness was that these tables that appear in correspondence with this entire proceedings are [illegible] by the fact of the understanding of the witness and come from official sources.

MR. KUNSTLER: Your Honor, I might say here that unless the fact alone that he recognizes this material or obtaining it, I don't know if she can answer that question. The other material, like tables that he mentioned, he has not worked with and probably has for more and accordingly he is just some [illegible] conversation, Your Honor. If it is any aid to Your Honor's ruling.

THE COURT: The point is that all of this material seems to be official Government documents.

THE WITNESS: It is.

THE COURT: Or have some source in official Government documents.

THE WITNESS: With one exception. There is one that is NEA, National Education Association. The rest of it is Government material.

THE COURT: And which one is the NEA?

THE WITNESS: The last table on page 8 which indicates percentage of teachers paid $6,500 or more, and the District of Columbia does not appear in that table.

THE COURT: Well, with the exception of that NEA table, then, all the rest seem to be official Government documents.

THE WITNESS: And one other exception, which is the other AFQT table which includes the eight year computation of test scores which we did from Defense Department material.

MR. CASHMAN: What table are you referring to now?

THE WITNESS: I am talking about the table, "Draftee failures on Armed Forces mental tests (by percent), August 1958 to December 1965." We took eight years of reports and compiled them.

BY MR. CASHMAN:

Q That was done by--

A That was done in the Office of Education and also recomputed in the Department of Defense.

Q I see. And was the basis of that the Office of the

THE WITNESS: With one exception. There is one that is NYA, National Youth Administration. The word is it is Government employed.

THE COURT: And which one is the NYA?

THE WITNESS: The last table on page 8 which indicates percentage of teachers paid $6,300 or more, and the District of Columbia does not appear in that table.

THE COURT: Well, with the exception of that NYA table, then, all the rest seem to be official Government documents.

THE WITNESS: And one other exception, which is the other ARW table which includes the eight-year comparative of test scores which, as did from before impeachment material.

MR. CASHMAN: What table are you referring to now?

THE WITNESS: I am talking about the table, "Trends Follows in some Tuskegee student data (by percent), August 1934 to December 1940." We took eight years of reports and compared them.

BY MR. CASHMAN:

Q That was done by--

A That was done in the office of Research and also recomputed in the Department of Defense.

Q I see. Can you tell us the basis of that the office of the

Surgeon General of the Army?

A The raw data came from the Office of The Surgeon General.

Q I see.

THE COURT: As I was indicating, the tables all seem to be official documents of the United States with the exception of the NEA table. Even as to the table the witness has just referred to, the source is an official document; and the witness, I assume, prepared this table from official documents in the same way that she prepared the table on the right of page 9. Is that correct?

THE WITNESS: Yes.

THE COURT: So as far as these tables are concerned, unless counsel can show that they are inaccurate in some way, the Court would be inclined to accept them as being public records and authentic in what they state.

Now, the question is, what do you want to do with them?

MR. CASHMAN: The question is, Your Honor, I want to offer them myself at the proper time after counsel finishes his case on rebuttal.

THE COURT: All right. We will rule on it when you offer it.

So let us proceed with this witness, then.

Surgeon General of the Army?

A. The two Surgeon Generals [illegible] the Surgeon General.

Q. I see.

THE COURT: As I was indicating, the tables all seem to be official documents of the United States with the exception of the NIH manual. Even so to the tables the witness has just referred to, the source is an official document; and the witness, I assume, therefore will make from official documents in the same way that has prompted the ruling on the right of page 9. Is that correct?

THE WITNESS: Yes.

THE COURT: So at the so long [illegible] any [illegible] unless counsel and John Doe are interested in the [illegible] way, the Court would be inclined to adopt that as being public records and admissible in base [illegible] matter.

Now, the question is, [illegible] to do with [illegible]

MR. GARRAMONE: The question is, Your Honor, I want to offer this manual by the [illegible] this after [illegible] finishes his case on rebuttal.

THE COURT: All right. We will rule on it when you offer it.

Do [illegible] with this witness, [illegible]

MR. CASHMAN: Very well, Your Honor.

BY MR. CASHMAN:

Q Mrs. Conner, are you in a position to tell us at all with respect to the column relating to the eighteen year olds and the eighteen month study, are you in a position to tell the Court how many of the men who were examined went to public schools and graduated from public schools as contrasted to private or parochial schools?

A No, sir.

MR. CASHMAN: I have no further questions, Your Honor, of the witness.

MR. KUNSTLER: I have just one or two, Your Honor, and I am through.

REDIRECT EXAMINATION

BY MR. KUNSTLER:

Q Mrs. Conner, in figuring out your U. S. average, I am talking now only about the table that I offered into evidence, can you indicate how you calculated the national average?

A The total number of people tested and the obvious division of the percentage of people who have failed.

Q I see. You did it on a complete basis, not just State by State?

A Yes, it is not State by State.

MR. CASHMAN: Very well, Your Honor.

BY MR. CASHMAN:

Q Mrs. Conner, are you in a position to tell us at all with respect to the Indian Building at the Algonquin Inter-Tribal Indian Ceremonial Association, are you in a position to tell the Court how many of the bus boys assigned work to public schools are permitted from public schools as contrasted to private or parochial schools?

A No, sir.

MR. CASHMAN: I have no further questions, Your Honor, of the witness.

MR. KUNTZLER: I have just one or two, Your Honor, and I am through.

REDIRECT EXAMINATION

BY MR. KUNTZLER:

Q Mrs. Conner, in figuring out your U. S. average, I am taking now only about the table that I showed you yesterday, can you tell me how you calculated the national average?

A The total number of people taking and the various divisions of the percentage of people who main tribal.

Q I see. You did it on a complete basis, not just based by basis?

A Yes, it is not based by basis.

Q I wanted to ask you just one or two questions. How many Negroes were involved in the State of New York?

A 3,680.

Q And what about the State of Illinois?

A 2,123.

Q Michigan?

A 1,374.

Q California?

A I guess that is 1,041.

Q And Pennsylvania?

A Where is Pennsylvania? I can't find it.

MR. CASHMAN: It is the third block up from the bottom.

THE WITNESS: 1,390.

BY MR. KUNSTLER:

Q Now, Mr. Cashman raised the point about the fact that, I think, Montana only had one Negro and you have a figure there of 100 percent.

A Obviously that figure should not be there.

Q I notice you have the figure in parentheses which you only do for two or three others. Why is the figure in parentheses?

A There is an editorial assistant in my office who is a woman named Jeanette Sofokidis. She did the final

Q I assume it was just one or two questions.

How many employees were involved in the issue of the lawsuit?

A 3,680.

Q And what about the State of Illinois?

A 2,123.

Q Michigan?

A 1,374.

Q California?

A I guess that is 1,041.

Q And Pennsylvania?

A Where is Pennsylvania? I can't find it.

MR. CASHMAN: It is the third block up from the bottom.

THE WITNESS: Yes.

BY MR. KUNSTLER:

Q Now, Mr. Swinson, return the point where the first time, I think, Boulder County had the flight. And you have a figure there of 100 passengers.

A Definitely that figure should not be there.

Q I notice you have the figure in parentheses which you only do for very closed. Why is the figure in parentheses?

A There is no substantial evidence in my office that is a proper legal legitimate indication. The file was first

proofreading; and to be quite honest, I never looked at the galley proofs myself; and I can't really answer the question. I would not myself have done it that way. However, I just did not pay that much attention to the particular detail. I think all those figures should have been starred and eliminated.

Q I notice at the bottom of the page it states small sample,and shows parentheses and uses the phrase small sample. What does that mean?

A Obviously that means the sample is very small. Clearly one person is not a small sample. It is a figure too small to be meaningful. It should have been starred rather than the phrase small sample.

MR. KUNSTLER: No further questions, Your Honor.

RECROSS EXAMINATION

BY MR. CASHMAN:

Q Mrs. Conner, one question. With respect to the figures relating to the District of Columbia, is there any way of knowing from these figures or do you know how much of the sample dealt with children that the District of Columbia had received from the Deep South?

A Of course I don't, but I refer you to Mr. Harris's recent survey.

[illegible] not to be quite secret. I rather looked at the polling [illegible] and I don't really answer the question. I would say [illegible] that [illegible]. However, I just did not [illegible] attention to the preliminary [illegible]. I think all these figures should have been [illegible] and clarified.

Q I notice at the bottom of the page it states small sample, but then parenthesized and [illegible] small sample. Just [illegible]?

A Obviously that means the sample is very small. Clearly the person is not a small sample. It is a figure too small to be meaningful. It should have been [illegible] rather than the phrase small sample.

MR. KUNSTLER: No further questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Blumenfeld:

Q Mr. Fraser, one question. With respect to the figures relating to the District of Columbia, is there any way of knowing from those figures if the [illegible] of the sample that with [illegible] the [illegible] Columbia had received from the [illegible]?

A If course I don't. But I have yet to see Harris's recent survey.

Q Mr. Harris's recent survey?

A Yes.

Q I am talking about this particular table.

A No, there is absolutely no data in this material which would indicate that.

MR. CASHMAN: Thank you, Mrs. Conner.

MR. KUNSTLER: No further questions, Your Honor.

THE COURT: All right. Now, do you want this witness here while you make another offer, Mr. Cashman?

MR. CASHMAN: Your Honor, I don't believe it will be necessary, no.

THE COURT: All right. You are excused, Mrs. Conner. Thank you very much.

(Witness excused.)

MR. KUNSTLER: As I have indicated, Your Honor, with this witness, we have no further witnesses. And I just have a few loose ends I want to clear up with the Court. And I would like to make these requests, Your Honor.

First of all, I would like, Your Honor, pursuant to Rule 65(a)(2) of the Federal Rules, which is the new rule regarding consolidation of a hearing on a preliminary injunction with trial on the merits, that evidence received

Q Mr. Martin's recent survey?

A Yes.

Q I am talking about this particular table.

A No, there is absolutely no data in this material which would indicate that.

Mr. Kunstler: Good grief, Mr. Cramer.

Mr. Kunstler: Be further questions, Your Honor.

THE COURT: All right. Then, if you back this witness here while you cross-examine after, Mr. Kunstler?

MR. CRAMER: Your Honor, I don't believe it will be necessary, no.

THE COURT: All right. You are excused, Mrs. Conner. Thank you very much.

(Witness excused.)

MR. KUNSTLER: As I have indicated, Your Honor, with this witness, we move for further witnesses. And I just have a few items which I want to clear up with the Court. And I would like to make those requests, Your Honor.

First of all, I would like, Your Honor, pursuant to Rule 26(a)(2) of the Federal Rules, which is the new rule regarding exchanges of a hearing on a preliminary injunction with trial on the merits, that evidence received

in the preliminary injunction be consolidated with the trial for the purposes of being offered as evidence at the trial. The rule provides that that request can be made at any time after the preliminary hearing, I believe it states; and I would like to make that request to Your Honor. I don't know whether you want argument on that.

THE COURT: No. The Court tried the case on the merits.

MR. KUNSTLER: All I am asking is that under 65 it can take up as part of the evidence evidence submitted at the preliminary hearing as part of the record in this case.

THE COURT: And what preliminary hearing do you have reference to?

MR. KUNSTLER: The one on the request for a preliminary injunction.

The rule is, I think, a brand new one. I brought it with me. It is Rule 65(a)(2). It states:

"Consolidation of a hearing with trial on merits. Before or after the commencement of a hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when

this consolidation is not ordered, any evidence received upon application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record of the trial and need not be repeated upon the trial."

THE COURT: There is no problem about that. I am ashamed to admit that I don't remember the proceeding on preliminary injunction. Did we have one?

MR. KUNSTLER: We had one, Your Honor.

THE COURT: With witnesses?

MR. KUNSTLER: With witnesses, with reference to the past House study. We asked for a preliminary injunction to prevent the expenditure of funds.

THE COURT: But that has nothing to do with the merits of this case.

MR. KUNSTLER: Well, there was testimony introduced, as I recall, by Dr. Hansen which had to do essentially with the efforts of the defendants, at least our position is, to preempt the lawsuit, and our position was that with the question of intent that some of that evidence might be relevant.

All we are indicating is that it is before the Court if the Court wants to consider it.

THE COURT: All right. The Court will hear

this constitution is not proper, my evidence rewolves upon application for a preliminary injunction which would be admissible upon the trial on the merits because part of the record of the trial and must not be separated from the trial.

THE COURT: There is no problem about that. I am advised to adopt that I don't consider the proceeding on preliminary injunction. Did we have one?

MR. KUNSTLER: We had one, Your Honor.

THE COURT: With witnesses?

MR. KUNSTLER: With witnesses, with reference to the past House study. We asked for a preliminary injunction to prevent the commencement of /Mrda/.

THE COURT: But that has nothing to do with the merits of this case.

MR. KUNSTLER: Well, there was testimony introduced, as I recall, by Mr. Rocco which had to do particularly with the effects of the defendants, at least our position is, to prevent the lawsuit, and our position was that with the question of intent that some of this evidence might be relevant.

All we are indicating is that it is before the Court if the Court wants to consider it.

THE COURT: All right. The Court will hear

from Mr. Cashman.

MR. CASHMAN: Yes, Your Honor, if I may.

Your Honor, the preliminary injunction is a little bit misty in my own mind as well. May we do this, Your Honor. May we ask the Court to take it under advisement, give us a short time within which to make an evaluation, and submit our standing to the Court in writing?

THE COURT: All right, sir. We will reserve ruling on the motion.

MR. KUNSTLER: Now, Your Honor, I want Your Honor's permission to submit, as we promised, a clean copy of W-3 and withdraw the marked copy to which I believe Mr. Cashman took exception and substitute therefor the clean copy.

MR. CASHMAN: May it please the Court, my objections to that document are on the record. I know that all that is being done is a clean copy is being submitted. I have the same objections, Your Honor.

THE COURT: All right, sir.

MR. KUNSTLER: Now, Your Honor, I think that two of Mr. Hobson's documents, V-16 and V-18, Mr. Mullaney had; and if there is no objection on those, I would offer them at this time.

Cross-Examination.

MR. GARNHAM: Yes, Your Honor, if I may.

Your Honor, the preliminary injunction is a little bit more in the nature of a trial. They do not ask Your Honor, they do not ask the Court to make it under Article 4, give us a short time within which to come to preliminary and ultimately we proceed to the Court in writing.

THE COURT: All right, sir. We will reserve ruling on the motion.

MR. KUNSTLER: Now, Your Honor, I want Your Honor's permission to recall Mr. Ehrlichman, a plain error of Mr. and attorney the period that I believe Mr. Garnham has conferred and publicly discussed the plain error.

MR. GARNHAM: May it please the Court, my objections to that document are on the record. I know that all that is being done is a plain error is being publicized. I have the same objections, Your Honor.

THE COURT: All right, sir.

MR. KUNSTLER: May, Your Honor, I ask that the at Mr. Ehrlichman's convenience, 9-30 and 7-12, Mr. Ehrlichman and if there is an objection on them, I would offer them at this time.

THE DEPUTY CLERK: Plaintiffs' Exhibit V-16 marked for identification; plaintiff's Exhibit V-18 marked for identification.

MR. CASHMAN: No objection, Your Honor.

THE COURT: All right. Let V-16 and 18 be admitted.

(Documents were received in evidence and marked Plaintiffs' Exhibits V-16 and V-18, respectively.)

MR. KUNSTLER: Now, I only have two more matters, Your Honor. We are now going through the transcript, and there may be some loose ends. We have gone through about one-half at this time. And I spoke to Mr. Mullaney during the break, that if there are any things we find in the transcript which the Corporation Counsel was to supply which have not already been indicated, that we would serve upon them within five days a list of what they are as we found in the transcript. It may be that there are none, but we are now going through seven thousand pages to find out; and if we do find some, that we would make a procedure to submit them to the Court. And I also request that they would do the same as far as we are concerned, as far as loose ends are concerned, clean copies or other documents that will

CHAMBERLAIN VIDEO, 'FACILITY' exhibits V-15 marked for identification; plaintiff's Exhibit V-16 marked for identification.

MR. GORDEAU: No objection, Your Honor.

THE COURT: All right. Let V-15 and 16 be admitted.

(Documents were received in evidence and marked Plaintiff's Exhibits V-15 and V-16, respectively.)

MR. ATWOOD: Now, I only have two more matters, Your Honor. We are now going through the transcript, and there may be some issues such. We have gone through about one-half at this time. And I wanted to ask Mr. Mallamby during the lunch, that if there are any things we find in the transcript which the Commission counsel are to supply which have not already been included, that we would serve upon them within five days a list of what they are as we found in the transcript. It may be that there are some, but we are now going through after discussing pages in fact and if we do find some, that we would make a preparation to submit them to the Court. And I also request that this would be the same as far as my cross-examination, as far as some are concerned, there maybe or other documents that will

be supplied.

There is some question, Your Honor, about certain documents which were received in evidence which were replacements for documents which we had offered first and clean copies substituted by the Corporation Counsel where there is some question in our mind that some of them might not be complete. And we wondered whether it would be possible to have one of our representatives with the Corporation Counsel, if the exhibits are going to be available for the next few days, to at least go through those.

Lastly, Your Honor, we only have one more request. We would like to take with us for one day only our V series of 1 to 10, which are charts. We want to make copies for ourselves in connection with any future proceedings in the matter.

THE COURT: That permission will be granted.

MR. KUNSTLER: Thank you, Your Honor.

And then lastly, Your Honor, we are at Your Honor's pleasure as far as whether you wish oral argument or don't wish oral argument. It is the recommendation of the plaintiffs as far as they are concerned that it would be almost impossible to give any kind of intelligent oral argument based on such a monumental record. If Your Honor

be supplied.

MR. [illegible]: There is some question, Your Honor, about certain documents which were received in evidence which were requirements for discovery which we have objected that which certain submitted by the corporation counsel where there is some question in our mind that some of them might not be complete. But we wondered whether it would be possible to have one of our representatives with the corporation counsel, if the matters are going to be available for the next few days, to at least go through them.

Lastly, Your Honor, we only have one more request. We would like to take with us for one day only our V series of 1 to 10, which are alerts. We want to make review for ourselves in connection with any future proceedings in the matter.

THE COURT: That particular will be granted.

MR. [illegible]: Thank you, Your Honor.

And then lastly, Your Honor, we are at Your Honor's pleasure as far as another pre-trial conference or don't with oral arguments. It is our recommendation on the plaintiffs as far as they are concerned that it would be almost impossible to do any kind of intelligent oral argument based on such a conceptual ground. If Your Honor

desires oral argument, we are prepared to follow Your Honor's dictates in the matter.

Then as far as the brief is concerned, we would like to get Your Honor's permission, assuming Your Honor wants briefs, that we have a sufficient period of time. I am suggesting 60 days for the completion of briefs. And I am also suggesting to Your Honor that the briefs not concern themselves, if this is Your Honor's feeling, with any question of remedy, and that should the plaintiffs prevail in this case that the question of remedy, which is an extremely complicated one, be deferred should that be Your Honor's ruling as the court did in Brown, where the remedy was the subject of another hearing, I think, six or eight months later and, therefore, confine the briefs to the law and the factual presentation; and should we prevail, then have a question of remedy. Should we not prevail there will, of course, be no further consideration of remedy.

And with that, Your Honor, we have nothing further to offer.

THE COURT: All right, sir. Mr. Cashman.

MR. CASHMAN: Your Honor, may I address myself to some matters presently pending before I go to representations of counsel?

THE COURT: Yes.

MR. CASHMAN: Your Honor, this has to do with the testimony of the last witness. There are three documents that were offered in connection with that testimony. One is a statistical breakdown, A-38 for Identification; and, Your Honor, I have no objection to that.

THE COURT: Let A-38 be admitted in evidence.

(A-38 for Identification was received in evidence and marked A-38.)

MR. CASHMAN: The other, A-41, is an information pamphlet apparently put out by the United States Army Personnel Research Office relating to information regarding the Armed Forces Qualification Test. Your Honor, I have no objection to that document.

THE COURT: Let that be admitted.

(A-41 for Identification was received in evidence and marked A-41.)

MR. CASHMAN: Your Honor, Plaintiffs' A-40, however, is a letter directed to Mrs. Conner from one Lieutenant Colonel Emmett C. Lee, and, Your Honor, I have no objection to the covering letter. However, I have a serious objection, Your Honor, to the addendum. The addendum represents, as far as I am able to see and the witness so testified, her

THE COURT: Yes.

MR. CASHMAN: Your Honor, this has to do with the testimony of the Jail Warden. There are three documents that were offered in connection with that testimony. One is a statement concerning, I-30 the identification; and, Your Honor, I have no objection to them.

THE COURT: Let A-30 be admitted in evidence.

(A-30 for Identification was received in evidence and marked A-30.)

MR. CASHMAN: The other, A-41, is an information purported apparently put out by the United States Army Internal Security Office relating to information regarding the Armed Forces qualifications. Your Honor, I have no objection to that document.

THE COURT: Let that be admitted.

(A-41 for Identification was received in evidence and marked A-41.)

MR. CASHMAN: Your Honor, "Instructions" I-40, however, is a letter directed to Gen. Cosgrove from the Lieutenant Colonel Joseph T. Lee, and, Your Honor, I have no objection to the covering letter. However, I have a serious objection, Your Honor, to the enclosure. The enclosure concerns, as far as I can with my eye and the witness on cross-, the

last galley draft of the article in question. Your Honor, I have had objection to the article, of course. It was not offered by the plaintiff, or it was and was withdrawn. Your Honor, I do not want to come into evidence indirectly what I would oppose directly. So I would object to this, Your Honor.

THE COURT: All right, sir. Now, as I understand it, you are offering not only the covering letter but the draft as well.

MR. KUNSTLER: That is correct, Your Honor, not so much for the truth of the draft but the fact that the covering letter says the attached galley proofs have been checked for accuracy and indicates what the Department of the Army was checking for accuracy; and since it contains copies of the tables that are before Your Honor--

THE COURT: I take it, Mr. Cashman, that you will concede that the covering letter does refer to checking the tables that have been offered in evidence by both sides.

MR. CASHMAN: Yes, Your Honor. It refers to the check for accuracy against the source material provided to you by this office; and in so far as it relates to the source material, the tabular data, Your Honor, I have no

last policy draft of the article in question. Your Honor, I have had questions in the article, of course. It was not offered by the plaintiff, or it was and was withdrawn. Your Honor, I do not want to come into evidence inadvertently that I would oppose directly. So I might object to that, Your Honor.

THE COURT: All right, sir. Now, as I understand it, you are differing and only the covering letter not the draft as well.

MR. KUNSTLER: That is correct, Your Honor, not so much for the terms of the draft but the fact that the covering letter says the attached policy guidelines have been checked for accuracy and indicate that the Department of the Army was checking for security; and since it contains copies of the Stalin land are Yalta Yuan d-ar--

THE COURT: I take it, Mr. Gershman, that you will concede that the covering letter was prior to writing the Yalta line that have been offered in evidence by both sides.

MR. GERSHMAN: Yes, Your Honor. It refers to the draft for purposes relating the terms mentioned previously to you by this office, and in so far as it relates to the terms material, the letter date. Your Honor, I mean by

objection at all.

It is the text to which I object, and I want to make clear on the record that this would not be received so as to be evidence as far as the text is concerned, because, Your Honor, it concerns itself with many private opinions of the contributors to the article. As a matter of fact, it refers to evidence that has been previously excluded by action of this Court.

THE COURT: I think, then, that we have the understanding that the covering letter does refer to the correctness of the tabulations as shown in the table, is that correct?

MR. KUNSTLER: If that is conceded, Your Honor, we don't need the rest of the material.

THE COURT: Let the covering letter be admitted with that understanding.

MR. CASHMAN: Yes, Your Honor.

THE COURT: What is the exhibit number?

MR. KUNSTLER: It is No. A-40, Your Honor.

THE COURT: And let the other part of the exhibit be withdrawn.

(Plaintiffs' Exhibit A-40 for Identification was received in evidence and marked Plaintiffs' Exhibit A-40. Galley proofs withdrawn.)

deposition of oil.

It is the duty to rules I believe, and I must ir-
rule either on the record that this would not be relevant
or -- we be in evidence at the end of the part it concerned. However,
that point, it concerns itself with many injuries claims
of the complainant in the written. In a matter of fact,
it refers to evidence that has been previously received
action of this court.

THE COURT: I think, then, that we have the
understanding that the remaining letter does refer to the
conversations of the deposition in claim in the PAGE, is
that correct?

MR. KUNSTLER: If that is stipulated that Mr.
Ho's part the part of the material.

THE COURT: Let the remaining letter be stricken
with that understanding.

MR. LEBOWITZ: Yes, that Court.

THE COURT: What is the exhibit number?

MR. KUNSTLER: It is No. A-40, Your Honor.

THE CLERK: Not the other part of the exhibit
be withdrawn.

(Plaintiffs' Exhibit A-40
for identification was marked
in evidence and marked Plaintiffs'
Exhibit A-40. Letter dated
[illegible].)

THE COURT: Mr. Cashman, do we still have the table itself? Is that still before us?

MR. CASHMAN: The table itself, Your Honor, yes. My only objection, Your Honor, is the one that I made earlier, and Your Honor has already ruled on that. I won't argue it further.

THE COURT: Let it be admitted. And that is exhibit what, sir?

THE DEPUTY CLERK: A-34a.

(Plaintiffs' Exhibit A-34a for Identification was received in evidence and marked Plaintiffs' Exhibit A-34a.)

THE COURT: A-34a, that is only the table which appears on page 9 on the right-hand side.

MR. CASHMAN: Yes, Your Honor.

Now, Your Honor, I have in my hand A-37, which is a document that relates to governmental finances in '64-'65, and, Your Honor, it describes or purports to describe the per capita amounts of selected items of State and local government finances for that year, and the page that is marked is 46 and the exhibit marking is A-37 for Identification.

Your Honor, I do have an objection to this document, because it is a highly distorted picture of

[illegible]: Mr. Chairman, do we still have the table itself? Is that still before us?

MR. CHAIRMAN: The table itself, Mr. [illegible], yes.

My only objection, Your Honor, is the one that I made earlier, and Your Honor has already ruled on that. I won't argue it further.

THE COURT: Let it be admitted. And what is exhibit that, sir?

[illegible]: A-[illegible].

(Photostatic copies of [illegible] for Identification was received in evidence and marked Plaintiff's Exhibit A-34a.)

[illegible]: A-34a, that is only the table which appears on page 9 on the right-hand side.

MR. CARSHMAN: Yes, Your Honor.

Now, Your Honor, I have in my hand A-37, which is a document that purports to [illegible] figures in the [illegible], and, Your Honor, it purports to purport to describe the per capita expenditures of [illegible] funds and local government finances for that year, and the page that is marked is 86 and the exhibit marked is A-37 for identification.

Your Honor, I do have an objection to this document, because it is a highly distorted picture of

expenditures. The document appears to me to list in terms of millions of dollars by State both capital outlay and operating costs for local schools.

Of course, Your Honor, the District of Columbia in terms of total expenditure shows up among the very least in this area, because the District of Columbia, Your Honor, is compared in this sampling to the States; and, Your Honor, I believe the District of Columbia, in terms of population, has a much smaller population than the vast majority of States and, therefore, the expenditure for the children in the elementary and secondary schools of that population would, of course, be a figure that would be low in comparison to Statewide figures.

Your Honor, I think a more accurate offering to the Court would have been, say, a median per pupil expenditure figure if that could ever have been arrived at; but because of the obvious distortion, Your Honor, that this table shows with respect to expenditure, I object to the document coming in.

THE COURT: The Court will reserve ruling on that particular exhibit.

MR. CASHMAN: Your Honor, at a time earlier in this case I promised the Court an extraction of the resolution

expenditure. The document appears to be in line to those of millions of dollars by States both capital outlay and operating costs for local schools.

Of course, Your Honor, the District of Columbia in terms of total expenditure falls so among the very least in this area. Because the district of Columbia, Your Honor, is compared in this sampling to the States; but, Your Honor, I believe the District of Columbia, in terms of population, has a much smaller population than the vast majority of States and, therefore, the expenditure per the children in the elementary and secondary school of that population would, of course, be a figure that would be low in comparison to State-wide figures.

Your Honor, I think a very strong effort in the court would have been, my, a motion for full expenditure figure if that could ever have been argued at; but because of the divisive statistics, Your Honor, that this case came with respect to expenditure. I object to the testimony coming in.

THE COURT: The Court will reserve ruling on that particular exhibit.

Mr. CLEMENS: Your Honor, it is also material in this case I produced the sworn as statistics of the condition

by the Board of Education concerning the present status of the track system.

THE COURT: Yes.

MR. CASHMAN: Your Honor, I have that in my hand right now, and I tender it to the Court.

THE COURT: Suppose we simply mark that in evidence.

MR. CASHMAN: Would that be a Court's exhibit, Your Honor?

THE COURT: Court's Exhibit 1.

THE DEPUTY CLERK: Court's Exhibit No. 1 marked for identification.

(Resolution by the Board of Education concerning present status of track system was received in evidence and marked Court's Exhibit No. 1.)

MR. CASHMAN: Your Honor, in connection with further representations to the Court, I have here Dr. Dailey's raw data, the basis upon which these exhibits that he testified to rest.

It breaks down the individual schools considered, both in terms of IQ and in terms of median family income, per capita cost, and percent Negro and percent white. And I indicated that I would make this document available to the

If the words of Schmalzle concerning the Jewish people or the Jewish system.

THE COURT: Yes.

MR. GASSMAN: Your Honor, I have that in my hand right now, and I tender it to the Court.

THE COURT: Assume so simply make it a [illegible] evidence.

MR. [illegible]: Would that be a Jewish publication.

THE COURT

THE [illegible]: Court's Exhibit 1.

THE SECRETARY: Court's Exhibit No. 1 marked for identification.

(Marked for the Court of Schmalzle concerning Jewish status of Frank digging was received in evidence and marked Court's Exhibit No. 1.)

MR. GASSMAN: Your Honor, in connection with further interrogatories to the Court, I have here Dr. Reiley's raw data, the basis upon which these medicine feel he testified to that.

It begins over the individual physicians [illegible], both in terms of 10 and in terms of another Jewish income, per capita cost, and percent degree and people white. And I indicated that I would make this document available to the

other side for whatever ends they wished, and I would like to note that it is a document of six pages, Your Honor.

THE COURT: All right, sir. Let the record show it is being given to the other side.

MR. CASHMAN: I think, Your Honor, during the testimony of Mr. Koontz, the Assistant Superintendent in Charge of Secondary Schools, the Court inquired about the present student population status of students living in the Western-Dunbar optional zone.

I have here a statement from Mr. Koontz that I would like to read into the record for the information of the Court. It says:

"There are currently 35 students attending Western Senior High School living in the Western-Dunbar optional zone."

Now, Your Honor, the next is an estimate.

"It is estimated that of this number 19 are Negro and 16 are white."

Further, Your Honor, there is the statement:

"There are currently 67 students attending Dunbar Senior High School living in the Western-Dunbar optional zone. All of the students are Negro."

THE COURT: All right, sir. I assume there is no

other side for marking such that, and I would like to note that it is a document of six pages, Your Honor.

THE COURT: All right, sir. Let the record show it is being given to the other side.

MR. GRIFFIN: I think, you know, during the testimony of Mr. Kramer, the Contract Superintendent in Charge of Secondary Schools, the Court inquired about the general student population status of students living in the Washington-Hughes optional zone.

I have here a statement from Mr. Kramer that I would like to read into the record for the information of the Court. It says:

"There are currently 35 students attending Washington High School living in the Washington-Hughes optional zone."

Now, Your Honor, the text is as follows.

"It is estimated that of this number 15 are Negro and 15 are white."

Further, Your Honor, there is the statement:

"There are currently 47 students attending Frankford High School living in the Washington-Hughes optional zone. All of the students are Negro."

THE COURT: All right, sir. I believe there is no

objection to this.

MR. KUNSTLER: No, I have no objection to that, Your Honor.

THE COURT: Let it be considered as part of the record and admissible in evidence.

MR. CASHMAN: Very well, Your Honor.

(At this point there was a brief pause for change of reporters.)

objection to this.

MR. CHRISTIAN: No, I have no objection to that, Your Honor.

THE COURT: Let it be considered as part of the proposed case stipulation in evidence.

MR. CARRERAS: Very well, Your Honor.

(At this point there was a brief pause for changing of reporters.)

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MR. CASHMAN: Your Honor, the Clerk makes inquiry about --

THE DEPUTY CLERK: A-39.

MR. CASHMAN: A-39.

THE DEPUTY CLERK: That was the achievement by region of Negroes, which is part of the raw data of Mrs. Conner that she testified.

I gave it to Mr. Cashman along with the other exhibits at the break so he could examine them, cross-examine Mrs. Conner.

MR. CASHMAN: Yes, Your Honor, I am familiar with the document. It appears to me that if I don't have it here with me, I have it down in our other room.

I have examined the document, Your Honor. I have no objection to its admission, so it may be admitted subject to my furnishing it to the Clerk.

THE COURT: All right.

The number is what?

THE DEPUTY CLERK: A-39.

THE COURT: Let A-39 be admitted.

(Plaintiffs' Exhibit No. A-39 admitted in evidence.)

MR. CASHMAN: I believe one of Mr. Kunstler's representations to the Court was that in the exchange of clean

MR. CASHMAN: Yes, Your Honor, I am familiar with the document. It appears to me that if I don't have it here with me, I have it down in our other room.

I have examined the document, Your Honor. I have no objection to its admission, so it may be admitted subject to my furnishing it to the Clerk.

THE COURT: All right.

The number is what?

THE DEPUTY CLERK: A-39.

THE COURT: Let A-39 be admitted.

(Plaintiffs' Exhibit No. A-39 admitted in evidence.)

MR. CASHMAN: I believe one of Mr. Hunting's representations to the Court was true in the exchange of views

copies for copies that had been marked and received into evidence, there might exist the possibility -- I hope to put it that way -- that the documents were not complete.

Your Honor, efforts between counsel to make sure that the documents are complete will be effected and so we have no objection to that end being pursued.

THE COURT: Well, I would hope that counsel for both sides would have one member of each staff when we finish this trial to go through the documents with the Clerk to make certain that all the documents are intact, complete, and in the Clerk's possession.

MR. CASHMAN: We would be happy to do that, Your Honor.

THE COURT: I think Mr. Kunstler --

MR. KUNSTLER: We will do that, Your Honor. There was no implication in what I said.

THE COURT: No.

MR. KUNSTLER: Just a shifting of papers.

THE COURT: I understand.

What else do we have?

MR. CASHMAN: Yes, Your Honor.

The other day in connection with data that we wanted admitted, we handed a considerable amount of documents over to

copies for copies that had been marked and received into evidence, there might exist the possibility -- I hope to put it that way -- that the documents were not complete.

Your Honor, efforts between counsel to make sure that the documents are complete will be afforded and I do have no objection to that end being pursued.

THE COURT: Well, I would hope that counsel for both sides would have one member of each staff when we finish this trial to go through the documents with the Clerk to make certain that all the documents are intact, complete, and in the Clerk's possession.

MR. CASHMAN: We would be happy to do that, Your Honor.

THE COURT: I think Mr. Kunstler --

MR. KUNSTLER: We will do that, Your Honor. There was no implication in what I said.

THE COURT: --

MR. KUNSTLER: Just a shifting of papers.

THE COURT: I understand.

What else do we have?

MR. CASHMAN: Yes, Your Honor.

The other day in connection with this list we started admitted. We handed a considerable number of documents over to

the other side for their inspection.

Your Honor, we would like to have those back now for offering to the Court at this time.

THE COURT: Maybe Mr. Mullaney can help them on that and tell them what it is.

MR. CASHMAN: The data we handed you when -- last Thursday?

MR. KUNSTLER: Last Thursday.

MR. CASHMAN: Last Thursday.

MR. KUNSTLER: That is the superintendent's data?

MR. CASHMAN: Yes.

MR. KUNSTLER: We are not offering it.

MR. CASHMAN: I know that.

We are going to offer it at this time. May I have it, please?

(Gets envelope from plaintiffs.)

Now, again, Your Honor, there is a little confusion, I think.

What Miss Saltonstall has handed me is the data upon which the superintendent's questionnaire was based.

Now, that was not what I was referring to, Your Honor. Last Thursday I presented a series of documents from the superintendent's office.

the other side for their inspection.

Your Honor, we would like to have those back now for offering in the Court at this time.

THE COURT: Maybe Mr. Mullaney can help them on that and tell them what it is.

MR. CASHMAN: The data we handed you when -- last Thursday?

MR. KUNSTLER: Last Thursday.

MR. CASHMAN: Last Thursday.

MR. KUNSTLER: That is the superintendent's data?

MR. CASHMAN: Yes.

MR. KUNSTLER: We are not offering it.

MR. CASHMAN: I know that.

We are going to offer it at this time. May I have it, please?

(Gets envelope from plaintiffs.)

Now, again, Your Honor, there is a little confusion, I think.

What Miss Saltonstall has handed me is the data upon which the superintendent's questionnaire was based.

Now, that was not what I was referring to, Your Honor. Last Thursday I presented a series of documents from the superintendent's office.

MR. KUNSTLER: We have them.

(Documents handed to Mr. Cashman)

MR. CASHMAN: Your Honor, these represent official documents of the District of Columbia.

They have been shown to the other side. They relate to a variety of subjects, Your Honor.

I would ask that they be marked by the Clerk for identification and then we would move their admission.

THE COURT: What number would you like to give them, Mr. Cashman?

MR. CASHMAN: We have been marking all our documents successively, Your Honor. I think it would --

THE DEPUTY CLERK: The next number is 123.

MR. CASHMAN: I think it would serve our purpose if we continue to do so.

THE DEPUTY CLERK: Defendants' Exhibit No.123 marked for identification.

(Summary of Increases in operating expenses requested by the Board of Education, approved by the Commissioners and appropriated by Congress 1953-1966 marked as Defendants' Exhibit No. 123 for identification.)

Defendants' Exhibit No. 124 marked for identification.

MR. KUNSTLER: We have them.

(Documents handed to Mr. Cashman)

MR. CASHMAN: You have that referenced official documents of the District of Columbia.

They have been used in the other cases. They relate to a variety of subjects, Your Honor.

I would ask that they be marked by the Clerk for identification and then we would move their admission.

THE COURT: What number would you like to give them, Mr. Cashman?

MR. CASHMAN: We have been marking all our documents successively, Your Honor. I think it would --

THE DEPUTY CLERK: The next number is 123.

MR. CASHMAN: I think it would serve our purpose if we continue to do so.

THE REPORTER: [illegible] Exhibit No. 123) marked for identification.

(Summary of increases in operating expenses estimated by the Washington Gas Company, approved by the Commissioners and promulgated by Congress 1973-1974 marked as Defendants' Exhibit No. 123 for identification.)

Defendants' Exhibit No. 123 marked for identification.

(District of Columbia population by race for the years indicated marked as Defendants' Exhibit No. 124 for identification.)

Defendants' Exhibit No. 125 marked for identification.

(Pupil membership in regular day schools and average class size, by levels and race, for the years indicated marked as Defendants' Exhibit No. 125 for identification.)

Defendants' Exhibit No. 126 marked for identification.

(Distribution of pupils by curriculums and special programs in the school year 1964-65 marked as Defendants' Exhibit No. 126 for identification.)

Defendants' Exhibit No. 127 marked for identification.

(Scholarships won by students in senior high school marked as Defendants' Exhibit No. 127 for identification.)

Defendants' Exhibit No. 128 marked for identification.

(Work scholarship program marked as Defendants' Exhibit No. 128 for identification.)

Defendants' Exhibit No. 129 marked for identification.

(Followup survey senior high school graduates for years indicated marked as Defendants' Exhibit No. 129 for identification.)

Defendants' Exhibit No. 130 marked for identification.

(Percentages by race in the public schools for 1945 to present marked as Defendants' Exhibit No. 130 for identification.)

(District of Columbia population
by race for the years indicated
marked as Defendants' Exhibit No.
124 for identification.)

Defendants' Exhibit No. 125 marked for identification.

(Pupil membership in regular day
schools and average class size, by
levels and race, for the years
indicated marked as Defendants'
Exhibit No. 125 for identification.)

Defendants' Exhibit No. 126 marked for identification.

(Distribution of pupils by curriculums
and special programs in the school
year 1973-74 marked as Defendants'
Exhibit No. 126 for identification.)

Defendants' Exhibit No. 127 marked for identification.

(Scholarships won by students in
senior high school marked as
Defendants' Exhibit No. 127 for
identification.)

Defendants' Exhibit No. 128 marked for identification.

(Work scholarship program marked as
Defendants' Exhibit No. 128 for
identification.)

Defendants' Exhibit No. 129 marked for identification.

(Followup survey senior high school
graduates for years indicated
marked as Defendants' Exhibit No.
129 for identification.)

Defendants' Exhibit No. 130 marked for identification.

(Percentages by race in the public
schools for 1945 to present marked
as Defendants' Exhibit No. 130
for identification.)

Defendants' Exhibit No. 131 marked for identification.

(Special projects supported by funds other than District of Columbia government and deposited to the credit of the District of Columbia public schools marked as Defendants' Exhibit No. 131 for identification.)

Defendants' Exhibit No. 132 marked for identification.

(Elementary school construction since 1958 by income levels of neighborhoods to be served marked as Defendants' Exhibit No. 132 for identification.)

Defendants' Exhibit No. 133 marked for identification.

(Degrees held by teachers on October 22, 1964 marked as Defendants' Exhibit No. 133 for identification.)

Defendants' Exhibit No. 134 marked for identification.

(Staffing the District of Columbia public school system marked as Defendants' Exhibit No. 134 for identification.)

Defendants' Exhibit No. 135 marked for identification.

(District of Columbia public school construction marked as Defendants' Exhibit No. 135 for identification.)

Defendants' Exhibit No. 136 marked for identification.

(Annual total operating expenditures per pupil in the regular elementary and secondary day schools 1955-56 through 1965-66 marked as Defendants' Exhibit No. 136 for identification.)

Defendants' Exhibit No. 131 marked for identification.

(Special projects supported by funds other than District of Columbia government and deposited to the credit of the District of Columbia public schools marked as Defendants' Exhibit No. 131 for identification.)

Defendants' Exhibit No. 132 marked for identification.

(Elementary school construction since 1958 by income levels of neighborhoods to be served marked as Defendants' Exhibit No. 132 for identification.)

Defendants' Exhibit No. 133 marked for identification.

(Degrees held by teachers on October 22, 1964 marked as Defendants' Exhibit No. 133 for identification.)

Defendants' Exhibit No. 134 marked for identification.

(Staffing the District of Columbia public school system marked as Defendants' Exhibit No. 134 for identification.)

Defendants' Exhibit No. 135 marked for identification.

(District of Columbia public school construction marked as Defendants' Exhibit No. 135 for identification.)

Defendants' Exhibit No. 136 marked for identification.

(Annual total operating expenditures per pupil in the regular elementary and secondary day schools 1955-56 through 1965-66 marked as Defendants' Exhibit No. 136 for identification.)

Defendants' Exhibit No. 137 marked for identification.

(Statement showing amount and source of funds and the number of free lunches provided for needy elementary school children marked as Defendants' Exhibit No. 137 for identification.)

Defendants' Exhibit No. 138 for identification.

(Number of part-time classes in the elementary day schools at end of first six weeks in each year 1948-49 through 1964-65 and September 23, 1965 marked as Defendants' Exhibit No. 138 for identification.)

MR. CASHMAN: Your Honor, we move the admission of the public documents 123 through 138, which have been just marked for identification.

THE COURT: Counsel has moved the admission of Defendants' 123 to 138.

MR. KUNSTLER: Your Honor, they are all official documents.

I have an observation as to relevancy but since they are official documents I have no basis for objection to their going into the record.

THE COURT: All right. Let them be admitted.

(Defendants' Exhibits Nos. 123 through 138 admitted in evidence.)

MR. CASHMAN: Your Honor, I have in front of me two

Defendants' Exhibit No. 137 marked for identification.

(Statement showing amount and source of funds and the number of free lunches provided for needy elementary school children marked as Defendants' Exhibit No. 137 for identification.)

Defendants' Exhibit No. 138 for identification.

(Number of part-time classes in the elementary day schools at end of first six weeks in each year 1948-49 through 1964-65 and September 23, 1965 marked as Defendants' Exhibit No. 138 for identification.)

MR. CASHMAN: Your Honor, we move the admission of the public documents 123 through 138 which have been just marked for identification.

THE COURT: Counsel has moved the admission of Defendants' 123 to 138.

MR. KUNSTLER: Your Honor, they are all official documents.

I have an observation as to relevancy but since they are official documents I have no basis for objection to doing going into the record.

THE COURT: All right. Let them be admitted.

(Defendants' Exhibits Nos. 123 through 138 admitted in evidence.)

MR. CASHMAN: Your Honor, I have in front of me two

documents handed to me by co-counsel, which relate to cross tracking by subjects in the senior high schools and number of senior high school students with cross tracked programs.

Your Honor, I would show these to the other side and after they have perused them, I would ask that they be admitted.

They are also, Your Honor, official documents.

MR. KUNSTLER: Again, Your Honor, we have no objection to official documents.

THE COURT: Would you mark them with the next consecutive numbers and admit them in evidence?

THE DEPUTY CLERK: Defendants' Exhibit No. 139 marked for identification and received.

(Cross tracking by subjects in senior high schools marked as Defendants' Exhibit No. 139 and received in evidence.)

Defendants' Exhibit No. 140 marked for identification and marked received.

(Number of senior high school students with cross tracked programs marked as Defendants' Exhibit No. 140 and received in evidence.)

MR. CASHMAN: Your Honor, I have here in front of me another official document which relates to special projects supported by funds other than the District of Columbia Government and deposited to the credit of the District of Columbia

documents marked to be for co-counsel, which relate to cross tracking by subjects in the senior high schools and number of senior high school students with cross tracked programs.

Your Honor, I would show these to the other side and after they have perused them, I would ask that they be admitted.

They are also, Your Honor, official documents.

MR. KUNSTLER: Again, Your Honor, we have no objection to official documents.

THE COURT: Would you mark them with the next consecutive numbers and admit them in evidence?

THE DEPUTY CLERK: Defendants' Exhibit No. 139 marked for identification and received.

(Cross tracking by subjects in senior high schools marked as Defendants' Exhibit No. 139 and received in evidence.)

Defendants' Exhibit No. 140 marked for identification and marked received.

(Number of senior high school students with cross tracked programs marked as Defendants' Exhibit No. 140 and received in evidence.)

MR. CASHMAN: Your Honor, I have here in front of me another official document which relates to special programs supported by funds other than the District of Columbia Government and designated in the credit of the District of Columbia

public schools.

Your Honor, it is a breakdown from 1958 through 1965.

I believe, if I am not mistaken, it has already been received into evidence.

Your Honor,I give a copy to the Clerk as a clean copy of what has already been received.

Your Honor, I have in front of me, and I know the Court has already permitted me to leave our record open with respect to the pay increase recently approved by Congress.

Your Honor, my understanding is that it has passed both houses and presently awaits the President's signature.

I have, however, Your Honor, a copy as of now of the approved conference report as it left Congress for the signature of the Presdient.

Your Honor, is it your wish that I submit it at this time, that is, the conference report, or would it be preferable with the Court if I submitted the bill as it is signed by the President?

THE COURT: The latter, I think, Mr. Cashman. We will keep the record open for the document.

MR. CASHMAN: Very well, Your Honor.

The same applies, as I know Your Honor has indicated, to the approval of the budget.

public schools.

Your Honor, it is a breakdown from 1958 through 1965.

I believe, if I am not mistaken, it has already been received into evidence.

Your Honor, I give a copy to the Clerk as a clean copy of what has already been received.

Your Honor, I have in front of me, and I know the Court has already searched so to leave our record open with respect to the pay increase recently approved by Congress.

Your Honor, my understanding is that it has passed both houses and presently awaits the President's signature.

I have, however, Your Honor, a copy as of now of the approved conference report as it left Congress for the signature of the President.

Your Honor, is it your wish that I submit it at this time, that is, the conference report, or would it be preferable with the Court if I submitted the bill as it is signed by the President?

THE COURT: The latter, I think, Mr. Cashman. We will keep the record open for the document.

MR. CASHMAN: Very well, Your Honor.

The same applies, as I know Your Honor has indicated, to the approval of the budget.

THE COURT: That is correct.

MR. KUNSTLER: That's right.

MR. CASHMAN: Your Honor, in connection with further submission of documents by the defendants, we would ask permission -- because we don't have them here now -- to submit certain interrogatories and certain answers to interrogatories that were propounded and answered in this law suit.

The reason why I don't have them at this time is because, Your Honor, the folder in which they are is back at the office.

THE COURT: These were answered by some plaintiff?

MR. CASHMAN: Yes, Your Honor, they were.

THE COURT: Well, I take it there is no objection to these?

MR. KUNSTLER: No, Your Honor.

THE COURT: All right.

We will simply give them -- well, you just offer them in evidence and give them the next number.

MR. CASHMAN: Your Honor, as I say, I don't have them with me now, so it will be difficult for me to count them.

Some, Your Honor, related to matters that have been either withdrawn or stricken by the Court's order or action of counsel, so I wouldn't want to put in interrogatories that

THE COURT: That is correct.

MR. KUNKLER: That's right.

MR. CASHMAN: Your Honor, in connection with Section [illegible] of [illegible] in the [illegible], we would not publish -- because we don't have them here now -- to submit certain interrogatories and certain answers to interrogatories that were propounded and answered in this law suit.

The reason why I don't have them at this time is because, Your Honor, the folder in which [illegible] is [illegible] at the office.

THE COURT: These were answered by some plaintiff?

MR. CASHMAN: Yes, Your Honor, they were.

THE COURT: Well, I take it there is no objection to these?

MR. [illegible]: No, [illegible].

THE COURT: All right.

We will simply give them -- well, you just offer them in evidence and [illegible].

MR. CASHMAN: Your Honor, as I say, I don't have them with me now. So it will be [illegible] for me to court them.

Some, Your Honor, related to matters that have been either withdrawn or stricken by the Court's order in pending [illegible] cases, so I wouldn't want to put in interrogatories that

related to those particular aspects of the suit.

THE COURT: Well, we will hold the record open for whatever you want to offer.

MR. CASHMAN: Very well. Thank you, Your Honor.

MR. REDMON: With respect, Your Honor, to the matter discussed this morning, I think perhaps Your Honor's suggestion might well be taken, to cross-examine Doctor Grambs Friday morning by deposition, and perhaps Mr. Dixon in the afternoon, and that should wind up the record.

So unless counsel has some engagement -- Friday is the earliest time, of course, we could do it.

I would prefer to do it Friday, because like Your Honor, I would like to close this case and go back to work.

THE COURT: What about Friday?

MR. KUNSTLER: Friday is all right with us, Your HOnor.

THE COURT: Do you think you can get through both of them Friday?

MR. REDMON: Yes, Your Honor, I see no reason why that can't be done.

There will probably be some objection to some of the documents submitted by Doctor Grambs.

I might suggest that at the close of the deposition

related to those particular aspects of the suit.

THE COURT: Well, we will hold the record open for whatever you want to offer.

MR. CASHMAN: Very well. Thank you, Your Honor.

MR. REDMON: With respect, Your Honor, to the matter discussed this morning, I think perhaps the sequestration might well be taken, as yesterday, Doctor Sperling virtually mentioned by phonetics, and perhaps Mr. Nixon in his testimony, and that should wind up the record.

So unless counsel has some engagement -- Friday is the earliest time, of course, we could do it.

I would prefer to be in trial, because like Your Honor, I would like to close this case and go back to work.

THE COURT: What about Friday?

MR. KUNSTLER: Friday is all right with us, Your Honor.

THE COURT: Do you think you can get through both of them Friday?

MR. REDMON: Yes, Your Honor, I see no reason why that can't be done.

There will probably be some objection to some of the documents mentioned by counsel tomorrow.

I might mention that at the time of the Secretary

I will submit my reasons for objecting to the admission into evidence in writing and perhaps counsel will in opposition.

THE COURT: All right.

MR. KUNSTLER: That was going to be my question.

Now the books of Doctor Grambs that she brought here are not in evidence yet, but offered. I understand they will be held open subject to objection from the Corporation Counsel.

THE COURT: All right.

MR. CASHMAN: Your Honor, one other matter.

We have a chart which is identified as Defendants' 46 for identification, relating to the holding power in terms of dropouts in the District of Columbia Public School System, going back, Your Honor, to 1953 and including the 1965 school year.

Your Honor, as I recall our earlier colloquy, if the Court requires authentication of that document, Your Honor, I would be glad to provide a witness for such identification and substantiation.

THE COURT: Mr.Kunstler, what is your position on this?

MR. KUNSTLER: Your Honor, I renew my objection, Your Honor.

From the first I maintained and I think Doctor -- Mr.

I will submit my reasons for objecting to the admission into evidence in writing and perhaps counsel will in opposition.

THE COURT: All right.

MR. KUNSTLER: That was going to be my question.

Now the books of Doctor Gramba that she brought here are not in evidence yet, but offered. I understand they will be held open subject to admission from the Prosecution Counsel.

THE COURT: All right.

MR. GERMAN: Your Honor, one other matter.

We have a chart which is identified as Defendants' 46 for identification, relating to the policing power in terms of dropouts in the District of Columbia Public School System, going back, Your Honor, to 1947 and including the 1965 school year.

Your Honor, as I recall our earlier colloquy, if the Court requires authentication of that document, Your Honor, I would be glad to provide a witness for such identification and authentication.

THE COURT: Mr.Kunstler, what is your position on that?

MR. KUNSTLER: Your Honor, I renew my objection.

Your Honor.

From the first I maintained\I think Doctor -- Mr.

Bristor's testimony bears it out, that this is a meaningless chart, comparing two things that have no analogy or relationship to each other.

Not only is it a confusing chart for the Court to read, but I thought that Mr. Bristor's testimony clearly indicated it was meaningless.

He did not know what it meant and no witness has testified to it other than Mr. Bristor and I think statistically it is a meaningless chart and would clutter up the record.

THE COURT: Well, I think it may have some relevance. I don't see that we should exclude it completely. Mr. Bristor did testify with relation to some parts of it.

So I will overrule the objection and let it in evidence.

(Defendants' Exhibit No. 46 admitted in evidence.)

MR. CASHMAN: Then, Your Honor, unless the Court has some suggestions with respect to further matters of housekeeping that presently occur to the Court, none occur to me at this time.

THE COURT: Well --

MR. CASHMAN: Excuse me, Your Honor.

I do ask that the charts that have been identified

Bristor's testimony made it out, that this is a meaningless chart, comparing two things that have no analogy or relationship to each other.

Not only is it a confusing chart for the Court to read, but I submit that Mr. Bristor's testimony clearly indicated it was meaningless.

He did not know what it meant and no witness has testified to it other than Mr. Bristor and I think statistically it is a meaningless chart and would clutter up the record.

THE COURT: Well, I think it may have some relevance. I don't see that we should preclude it completely. Mr. Bristor did testify with relation to some parts of it.

So I will overrule the objection and let it in evidence.

(Defendants' Exhibit No. 46 admitted in evidence.)

MR. CASHMAN: Then, Your Honor, unless the Court has some suggestions with respect to further matters of housekeeping that presently occur to the Court, none occur to me at this time.

THE COURT: Well --

MR. CASHMAN: Excuse me, Your Honor.

I do not that the points that have been identified

by Mrs. Conner be marked as Defendants' Exhibits.

Your Honor, they are all charts appearing on pages 8 and 9 of the document A-32 -- A-34 a, pages 8 and 9, other than that which has already been offered by the other side.

THE COURT: Does that include this NEA?

MR. CASHMAN: Your Honor, I would offer the NEA figure.

Of course, Your Honor, the NEA figure doesn't even include the District of Columbia, if I am not mistaken.

THE COURT: She said it didn't.

MR. CASHMAN: So there is no real necessity, Your Honor, that that be done.

I just see here also, Your Honor, that I have marked the tables that I am offering, so if I may, Your Honor -- if there is a clean copy with respet to A-34a -- I would like to make that part of my remaining tables, Your Honor.

THE COURT: All right.

Is there objection to that?

MR. KUNSTLER: No objection, Your Honor. I would just like to make an observation to the Court that the fourth chart on page 8 which is called Estimated current expenditure per pupil in average daily attendance in public schools, is

by Mrs. Conner be marked as Defendants' Exhibits.

Your Honor, they are all charts appearing on pages 8 and 9 of the document A-32 -- A-34 a, pages 8 and 9, other than that which has already been offered by the other side.

THE COURT: Does that include this NEA?

MR. CASHMAN: Your Honor, I would offer the NEA figures.

Of course, Your Honor, the NEA figures doesn't even include the Department of Commerce, if I am not mistaken.

THE COURT: She said it didn't.

MR. CASHMAN: So there is no real necessity, Your Honor, that that be done.

I just see here also, Your Honor, that I have marked the tables that I am offering, so if I may, Your Honor -- if there is a clean copy with respect to A-34a -- I would like to make that part of my remaining tables, Your Honor.

THE COURT: All right.

Is there objection to that?

MR. KUNSTLER: No objection, Your Honor. I would just like to make a correction to the Court that the Department chart on page 8 which is entitled national current expenditure per pupil in average daily attendance by public schools is

an estimated expenditure. It doesn't square with our figures but since it says estimated, I am sure the Court will take that into consideration.

THE COURT: It reads estimated.

MR. KUNSTLER: It reads estimated.

THE COURT: All right.

With that observation the report will be admitted.

THE DEPUTY CLERK: Defendants' Exhibit No. 141 marked for identification and marked received.

(Charts on pages 8 and 9 of Document A-34a marked as Defendants' Exhibit No. 141 and admitted in evidence, except last chart on page 9.)

MR. KUNSTLER: Your Honor, before you close on that, I have -- are you through?

MR. CASHMAN: Not quite yet.

MR. KUNSTLER: All right.

MR. CASHMAN: Your Honor, there has been a representation concerning the date of filing of briefs in this matter.

Your Honor, we concur with the necessity for the filing of briefs and we would ask the Court that in connection with that filing both sides be permitted the opportunity to file proposed findings of fact and conclusions of law for the consideration of this Court.

Your Honor, I am in hearty agreement with counsel

an estimated expenditure. It doesn't square with our figures but since it says estimated, I am sure the Court will take that into consideration.

THE COURT: It reads estimated.

MR. KUNSTLER: It reads estimated.

THE COURT: All right.

THE DEPUTY CLERK: Defendants' Exhibit No. 141 marked for identification and marked received.

(Charts on pages 8 and 9 of Document A-34a marked as Defendants' Exhibit No. 141 and admitted in evidence, except last chart on page 9.)

MR. KUNSTLER: Your Honor, before you close on that, I have -- are you through?

MR. CASHMAN: Yes, sir.

MR. KUNSTLER: All right.

MR. CASHMAN: Your Honor, there has been a representation as to the date of filing of briefs in this matter.

Your Honor, we concur with the necessity for the filing of briefs and we would ask the Court that in connection with that filing both sides be permitted the opportunity to file proposed findings of fact and conclusions of law for the consideration of this Court.

Your Honor, I am in hearty agreement with counsel

that argument of this matter would probably tend to make an already overlong record further overlong and would not be of specific advantage to the Court.

However, I do ask permission to file proposed findings of fact and conclusions of law relating them to the exhibits and to the trial transcript, Your Honor.

THE COURT: Counsel had a suggestion as to timing.

MR. CASHMAN: Sixty days, Your Honor.

THE COURT: That was his suggestion.

MR. CASHMAN: Your Honor, my inclination is to say that sixty days is also agreeable with the defendants.

THE COURT: Well, in accordance with this Court's practice of many years' standing, going back some years, both sides will be requested to file proposed findings of fact and conclusions of law relating each proposed finding of fact to the pages in the transcript and the documents on which the party relies for that particular proposal.

Those findings should be filed by December the 20th. That is almost sixty days, since today is the 25th.

The Court will then request counsel for both sides to file briefs in support of their proposed findings and in opposition to the proposed findings of the other side by January the 20th, thirty days.

that argument of this matter would probably lead to much as already overlong record during many and would not be of specific advantage to the Court.

Therefore, I do not particularize to file proposed findings of fact and conclusions of law relating thereto in the exhibits and to the trial transcript, Your Honor.

THE COURT: Counsel had a suggestion as to timing.

MR. [illegible]: Sixty days, Your Honor.

THE COURT: That was his suggestion.

MR. CASHMAN: Your Honor, my inclination is to say that sixty days is also agreeable with the defendants.

THE COURT: Well, in accordance with this Court's practice of many years' standing, going back some years, both sides will be requested to file proposed findings of fact and conclusions of law relating each proposed finding of fact to the pages in the transcript and the documents on which the party relies for that particular proposal.

These findings should be filed by December the 27th. That is almost sixty days, since today is the 25th.

The Court will then request counsel for both sides to file briefs in support of their proposed findings and in opposition to the proposed findings of the other side by January the 26th, sixty days.

Now, is that sufficient time? Is there any reason why we can't make it thirty days?

MR. KUNSTLER: That is satisfactory, Your Honor.

MR. CASHMAN: I have no objection, Your Honor.

THE COURT: Do counsel have any other suggestions?

MR. KUNSTLER: Your Honor, I have one more offer to make, the document that was furnished to us a few moments ago.

It is W-15. It is the raw data on which Doctor Dailey's charts were made and we would like to offer it into evidence as our W-15.

I don't think Mr. Cashman --

THE DEPUTY CLERK: W-15 has been used.

W-15 is a book, Four Seasons with Susan.

MR. KUNSTLER: What is the last W number?

THE DEPUTY CLERK: W-30.

MR. KUNSTLER: W-30, Your Honor.

THE DEPUTY CLERK: No, the next one is W-31.

MR. KUNSLTER: W-31.

THE DEPUTY CLERK: W-31 marked for identification.

(Document on raw data from Doctor Dailey marked as Plaintiffs' Exhibit No. 31 for identification, Code for D. C. Schools)

THE COURT: You are offering this?

Now, is that sufficient time? Is there any reason why we can't make it thirty days?

MR. KUNSTLER: That is satisfactory, Your Honor.

MR. CASKMAN: I have no objection, Your Honor.

THE COURT: Do counsel have any other suggestions?

MR. KUNSTLER: Your Honor, I have one more offer to make: the document that was furnished to us a few moments ago.

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MR. KUNSTLER: W-30, Your Honor.

[illegible] W-31.

THE DEPUTY CLERK: W-31 marked for identification.

(Document or raw data from Doctor Dailey marked as Plaintiff's exhibit No. 31 for identification,Code for D. C. Schools)

MR. KUNSTLER: I am offering it, Your Honor.

I think the Court asked for it, if I am not mistaken, but we would offer it as our W-31.

MR. CASHMAN: Your Honor, I have no objection to it.

THE COURT: All right. Let it be admitted.

(Plaintiffs' Exhibit No. W-31 admitted in evidence.)

MR. KUNSTLER: Now --

THE COURT: Is there anything further?

MR. KUNSTLER: If there are any openings in the record, as I indicated before, we will work it out with counsel, and indicate to the Court what they are.

THE COURT: All right.

If any problems arise, the Court will be available to settle them.

MR. KUNSTLER: Thank you, Your Honor.

MR. WEINBERG: If the Court please --

THE COURT: Yes.

MR. WEINBERG: I am Robert Weinberg representing an organization which would like to file an amicus brief in this case, the School Action Council for Capitol East.

THE COURT: Just a minute, please. A little more slowly.

MR. WEINBERG: School Action Council for Capitol East.

MR. KUNSTLER: I am offering it, Your Honor.

I think the Court asked for it, if I am not mistaken, but we would offer it as our W-31.

MR. CASHMAN: Your Honor, I have no objection to it.

THE COURT: All right. Let it be admitted.

(Plaintiffs' Exhibit No. W-31 admitted in evidence.)

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If any problems arise, the Court will be available to settle them.

MR. WEINBERG: Your Honor, may I have --

THE COURT: Yes.

MR. WEINBERG: I am Robert Weinberg representing an organization which would like to file an amicus brief in this case, the School Action Council for Capitol East.

THE COURT: Just a minute, please. A little more slowly.

MR. WEINBERG: School Action Council for Capitol East.

An official of that organization, Mr. Michael Tigar, is present with me.

He has previously requested this permission of counsel for the plaintiffs and defendants.

Counsel for plaintiffs agreed and authorized me to so state.

Mr. Cashman, I believe, told Mr. Tigar that he would decide at a later date whether he would grant or withhold his consent.

MR. CASHMAN: I think what my representation was, Your Honor, I would decide when I saw the motion asking for leave of Court to intervene.

As yet I have not seen that motion.

MR. WEINBERG: It is not a motion to intervene, Your Honor. It is simply a motion for leave to file an amicus curiae.

MR. CASHMAN: I have not seen that, Your Honor.

THE COURT: Is this an oral motion?

MR. WEINBERG: Yes, Your Honor, it is.

THE COURT: You don't intend to file a written motion?

MR. WEINBERG: If Your Honor would prefer a written motion I certainly will.

THE COURT: No, an oral motion is fine.

And official of that organization, Mr. Michael Tigar, is present with me.

He has previously requested this permission of counsel for the plaintiffs and defendants.

Counsel for plaintiffs agreed and authorized me to so state.

Mr. Chairman, I believe, told Mr. Tigar that he would decide at a later date whether he would grant or withhold his consent.

MR. CASHMAN: I think what my representation was, Your Honor, I would defer that to the motion date for leave of Court to intervene.

As yet I have not seen that motion.

MR. WEINBERG: It is not a motion to intervene, Your Honor. It is simply a motion for leave to file an amicus curiae.

MR. CASHMAN: I have not seen that, Your Honor.

THE COURT: Is this an oral motion?

MR. WEINBERG: Yes, Your Honor, it is.

THE COURT: You don't intend to file a written motion?

MR. WEINBERG: If Your Honor would prefer a written motion I certainly will.

THE COURT: Mr. is oral motion is fine.

Counsel, would you like to respond to the motion?

MR. CASHMAN: Your Honor, I really don't know in detail exactly what the School Action Council for Capitol East represents.

Your Honor, I see here that there is a description of that organization.

Your Honor, if I could be permitted the opportunity to take a look at exactly what these people represent and what they intend to do, I think I would be more qualified to express my view with respect to the amicus at a later time.

THE COURT: How long will this take?

MR. CASHMAN: Oh --

THE COURT: I see. You mean a later date?

MR. CASHMAN: Yes, a later date.

Your Honor, is it my understanding that we are going to reconvene on Friday?

THE COURT: No, we are not.

MR. CASHMAN: We are not.

THE COURT: But as I have indicated before, an amicus request to file briefs is usually granted, since they may serve some purpose and perhaps they may not.

I assume that an amicus brief ordinarily takes one side or the other and I assume this one will.

Counsel, would you like to respond to the motion?

MR. CASHMAN: Your Honor, I really don't know in detail exactly what the School Action Committee or General Law represents.

Your Honor, I see here that there is a description of that organization.

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I assume that an amicus brief ordinarily takes one side or the other and I assume this one will.

MR. CASHMAN: Yes, Your Honor.

I am presently reading it while the Court is making its observations.

THE COURT: But this does not preclude its being received for whatever value the Court wants to place on it.

MR. CASHMAN: Your Honor, the description here before me I would ask be marked and included as a part of this file, indicating their own description of themselves , and with that description, Your Honor, I will make no objection to their coming in as an amicus for the purpose for which they want to here.

THE COURT: Let the document be marked -- what is the name of the organization?

MR. WEINBERG: The School Action Council for Capitol East.

Mr. Tigar was good enough to type out a one-page summary of the organization.

THE COURT: Let it be School Action Council No. 1.

THE DEPUTY CLERK: School Action Council Exhibit No. 1 marked for identification.

(Summary of its organization marked as School Action Council's Exhibit No. 1 for identification.)

THE COURT: Now, sir, with reference to the filing of

MR. CASHMAN: Yes, Your Honor.

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MR. WEINBERG: The School Action Council for Capitol Hill.

Mr. Tidar was good enough to type out a one-page summary of the organization.

THE COURT: Let it be School Action Council No. 1.

THE DEPUTY CLERK: School Action Council Exhibit No. 1 marked for identification.

(Summary of its organization marked as School Action Council's Exhibit No. 1 for identification.)

THE COURT: Now, sir, with reference to the filing of

this amicus brief, what is your view as to timing?

MR. WEINBERG: We would like to file it on January 20, the same date Your Honor gave to these plaintiffs and defendants.

It is anticipated that it is likely to favor in general the plaintiffs' position, but an independent review of the record will be made by the organization and it may very well not go down the line with either party to the litigation.

THE COURT: All right, sir.

We will make it January the 20th.

MR. WEINBERG: Thank you very much, Your Honor.

THE COURT: Do we have anything further, gentlemen?

MR. KUNSTLER: I hope not, Your Honor.

MR. REDMON: Your Honor better leave the courtroom before we get some more --

THE COURT: Before you get something else.

Well, gentlemen, it hasn't all been pleasant, but I never take anything out of the courtroom with me. Good day.

(Whereupon at 3:57 p.m. the proceedings in the above cause were concluded.)

* * * * * *

The foregoing 6737 gross-numbered pages are certified to be the official transcript of the proceedings indicated as reported by official court reporters.

Elaine O. Wells

Elaine O. Wells
Official Court Reporter

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Elaine O. Wells
Official Court Reporter